DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-382
Title: John Marshall, Warden, Petitioner
v.
Otis Lee Rodgers
Docketed: September 27, 2012
Linked with 12A440
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (10-55816)
Decision Date: May 17, 2012
Rehearing Denied: June 28, 2012

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Sep 25 2012	Petition for a writ of certiorari filed. (Response due October 29, 2012)
Oct 10 2012	Suggestion of mootness filed by respondent Otis Lee Rodgers.
Oct 24 2012	DISTRIBUTED for Conference of November 9, 2012.
Oct 29 2012	Application (12A440) to recall and stay pending disposition of the petition for a writ of certiorari, submitted to Justice Kennedy.
Nov 2 2012	Response to application (12A440) requested by Justice Kennedy, due Wednesday, November 7, 2012, by noon EST.
Nov 2 2012	Response to application from respondent Otis Lee Rodgers filed.
Nov 5 2012	Response Requested . (Due December 5, 2012)
Nov 5 2012	Application (12A440) for recall of mandate and stay of proceedings denied by Justice Kennedy, without prejudice to renewal of the application in light of any further order of this Court with respect to the petition for a writ of certiorari or in light of further developments in the trial court.
Nov 23 2012	Brief of respondent Otis Lee Rodgers in opposition filed.
Nov 23 2012	Motion for leave to proceed in forma pauperis filed by respondent Otis Lee Rodgers.
Dec 5 2012	DISTRIBUTED for Conference of January 4, 2013.
Jan 7 2013	DISTRIBUTED for Conference of January 11, 2013.
Jan 14 2013	DISTRIBUTED for Conference of January 18, 2013.
Feb 4 2013	DISTRIBUTED for Conference of February 15, 2013.
Feb 19 2013	DISTRIBUTED for Conference of February 22, 2013.
Feb 25 2013	DISTRIBUTED for Conference of March 1, 2013.
Mar 4 2013	DISTRIBUTED for Conference of March 15, 2013.
Mar 18 2013	DISTRIBUTED for Conference of March 22, 2013.
Mar 19 2013	Supplemental brief of respondent Otis Lee Rodgers filed. (Distributed)

Mar 25 2013	DISTRIBUTED for Conference of March 29, 2013.
Mar 28 2013	Supplemental brief of petitioner John Marshall, Warden filed. (Distributed)
Apr 1 2013	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Apr 1 2013	Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion)
Apr 15 2013	Petition for Rehearing filed.
Apr 30 2013	DISTRIBUTED for Conference of May 16, 2013.
May 20 2013	Rehearing DENIED.
May 20 2013	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

12 No. 382

SEP 15 2012

In the Supreme Court of the United States

JOHN MARSHALL, WARDEN, *Petitioner*,

v.

OTIS LEE RODGERS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

Does *Faretta* v. *California*, 422 U.S. 806 (1975), "clearly establish," for purposes of habeas corpus review of state-court judgments under 28 U.S.C. § 2254(d), that a defendant retains a constitutional right to revoke his prior waiver of counsel at trial and require re-appointment of counsel to file a new-trial motion?

LIST OF PARTIES

1. John Marshall
2. Otis Lee Rodgers

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PETITION FOR WRIT OF CERTIORARI

Warden John Marshall (the State) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's opinion reversing the judgment of the United States District Court and directing the district court to grant a conditional writ of habeas corpus is published. *Rodgers* v. *Marshall*, 678 F.3d 1149 (9th Cir. 2012). The district court's judgment denying relief and the magistrate judge's report recommending denial of relief are unpublished. The California Court of Appeal's opinion affirming Rodgers's criminal conviction was certified for partial publication. *People* v. *Rodgers*, 33 Cal. Rptr. 3d 163 (Cal. App. 2005). These decisions are reproduced in the Appendix to this petition.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on May 17, 2011. (Appendix A.) The Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc on June 28, 2012. (Appendix K.) The mandate was issued on July 10, 2012. (Appendix J.) The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Introduction

Section 2254(d) of Title 28 of the United States Code establishes a highly deferential standard for evaluating state convictions. Federal relief is precluded on a constitutional claim already decided on the merits by a state court unless that decision was "contrary to" or an "unreasonable application" of "clearly established federal law as determined by the Supreme Court of the United States." Here, the Ninth Circuit acknowledged that no United States Supreme Court precedent has addressed whether or under what circumstances a defendant may withdraw his *Faretta*[1] waiver of the right to counsel in order to pursue a post-verdict motion for a new trial. Nevertheless, the Ninth Circuit relied on its

---

[1] *Faretta* v. *California*, 422 U.S. 806 (1975).

own circuit precedent as supporting a rule that the state court presumptively must allow the defendant to withdraw his *Faretta* waiver and to demand appointment of counsel to file a new-trial motion. Because circuit precedent holds that acquiescence to such a demand by the defendant is almost always required unless the demand is made in bad faith, the Ninth Circuit panel here rejected the decision of the California court, which had entrusted the *Faretta*-waiver decision to the trial judge's discretion.

State Court Proceedings

1. In 2001, respondent Otis Lee Rodgers assaulted his wife with a firearm and threatened to kill her. The police responded, searched Rodgers's car, and found both a revolver and ammunition. (Appendix D at 31-32.)

Rodgers was charged with assault with a firearm, possession of a firearm by a felon, possession of ammunition by a felon, and making criminal threats. During pre-trial proceedings lasting two years, Rodgers oscillated back and forth between representing himself under *Faretta* and relying on court-appointed counsel. Ultimately, he represented himself at his trial and was found guilty as charged. (Appendix D at 33.)

Prior to sentencing, Rodgers asked for re-appointment of counsel for the limited purpose of preparing a motion for new trial. The trial judge denied the request. Rodgers filed the motion for new trial himself. The judge denied the motion and sentenced Rodgers to prison for sixteen years. (Appendix D at 57-61.)

2. In his direct appeal to the California Court of Appeal, Rodgers claimed that the trial court had erred in denying him re-appointment of counsel for

the motion for new trial. The Court of Appeal rejected the claim, and many other claims, in a partially published forty-two page opinion, *People* v. *Rodgers*, 33 Cal. Rptr. 3d 163. The state appellate court held that the trial court acted within its discretion, as recognized in state court precedents, in rejecting re-appointment of counsel in light of Rodgers's history of switching back and forth between representing himself and being represented by counsel throughout the case and in light of the fact that Rodgers had declined to offer any reason for his request when queried by the trial court. Instead, Rodgers had stated that he could and would file the motion on his own. As the state court observed, "If there were legitimate reasons" for Rodgers's request (Appendix E at 130), he was capable of expressing them. Indeed, ultimately, Rodgers filed a new trial motion, which was unsuccessful. (Appendix E at 126-130.)

The state court declined to follow a contrary Ninth Circuit precedent, *Menefield* v. *Borg*, 881 F.2d 696 (9th Cir. 1989), because that precedent had been rejected by the state court in *People* v. *Ngaue*, 229 Cal. App. 3d 1115, 280 Cal. Rptr. 757 (1991), and was contrary to the federal precedent in *United States* v. *Tajeddini*, 945 F.2d 458, 460-70 (1st Cir. 1991), *overruled on other grounds in Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000). (Appendix E at 8-13.)

The California Supreme Court denied further direct review on the claim. (Appendix D at 36 & n. 3.) Rodgers did not file a petition for writ of certiorari with this Court.

Federal Habeas Corpus Proceedings

1. Instead, Rodgers filed a federal habeas corpus petition reasserting the claim that the state trial

court had unconstitutionally denied re-appointment of counsel for the new-trial motion. (Appendix D at 37.) The magistrate judge issued a Report and Recommendation, noting that this Court had never addressed either the question of whether a post-verdict motion for new trial was a critical stage of the proceedings or the question of whether there existed a right to counsel to file a motion for new trial after a defendant had exercised his right to represent himself under *Faretta*. Accordingly, the magistrate concluded that the state court decision was not "contrary to" any precedent from this Court. It further ruled that, even if *Menefield* were binding precedent, the state court properly denied re-appointment of counsel because Rodgers had made his request in bad faith. (Appendix D at 57-68.) The district court adopted the Report and Recommendation and entered judgment rejecting Rodgers's habeas corpus petition. (Appendix B at 29).

2. In a published decision, a Ninth Circuit panel (Zahoury, Reinhardt, and W.A. Fletcher, JJ.), reversed and ordered habeas corpus relief on the claim. *Rodgers* v. *Marshall*, 678 F.3d 1149; (Appendix A.) The panel acknowledged that, under the AEDPA deferential-review standard contained in 28 U.S.C. § 2254(d), federal relief was precluded unless the state court's decision was "contrary to," or an objectively "unreasonable application" of, federal constitutional law as "clearly established" only by the holdings of this Court's precedents at the time the state court decided his case. In the panel's view, however, "clearly established" law indeed dictated that a *pro se* defendant was constitutionally entitled to re-appointment of counsel in order to file a new-trial motion unless the request was made in "bad faith." (Appendix A at 12-16.)

The panel analyzed the issue in two steps. First, the panel determined that it was "clearly established" that a new-trial motion was a "critical stage" of the trial such that the defendant enjoyed a constitutional right to counsel. (Appendix A at 12-16.) In doing so, however, the panel acknowledged that this Court *"has never squarely addressed whether a post-verdict motion for new trial was one of those [critical][stages."* (Appendix A at 12.) But, the panel asserted, that did not disable the circuit court "from identifying and applying [this Court's] general governing principles to the case at hand." In purporting to do that, the panel relied on the Ninth Circuit decision in *Menefield,* 881 F.2d 696, a pre-AEDPA case holding that a post-verdict motion for new trial is a Sixth Amendment "critical stage," as "persuasive authority" on the question of "whether the state decision violates the general principles established by the Supreme Court and is thus contrary to clearly established law." (Appendix A at 15.) Relying solely on *Menefield's* analysis—which had pointed out the value of counsel in securing a "last opportunity" for a review of the defendant's constitutional claims unconstrained by appellate-review rules that are deferential to trial court decisions—the panel concluded "that it is clearly established Supreme Court law that a pre-appeal motion is a 'critical stage' under the Sixth Amendment." (Appendix A at 15.)

Next, the panel considered whether "clearly established federal law" under § 2254(d) dictated that a defendant may re-assert his right to counsel at a new-trial motion after previously waiving it under *Faretta.* Again, as with the "critical stage" issue, *the panel acknowledged that this Court had never explicitly spoken on the question.* (Appendix A at 19.) But, in an analysis similar to the one it brought to

bear on the "critical stage" question, the panel treated as binding precedent a previous Ninth Circuit decision, in *Robinson* v. *Ignacio*, 360 F.3d 1044 (9th Cir. 2004). The Ninth Circuit in that case had held that a defendant's re-assertion of his right to counsel at the sentencing hearing may not be denied simply because he had previously waived the right. The *Robinson* holding, in turn, had been based primarily upon a pair of Ninth Circuit precedents, including *Menefield*, that had extrapolated similar rules from *Faretta*. Under *Robinson*, the panel in Rodgers's case ruled that a good-faith post-trial revocation of the defendant's previous *Faretta* waiver presumptively must be allowed in the absence of "extraordinary circumstances." (Appendix A at 19-23.)

The panel paused to note the intervening Ninth Circuit precedent in *John-Charles* v. *California*, 646 F.3d 1243 (9th Cir. 2011), which recognized that "no Supreme Court authority holds that a defendant has a constitutional right to post-*Faretta* appointment of counsel once trial proceedings have commenced." *Id.* at 1252. *John-Charles* further observed that, where there is no Supreme Court decision "closely on point" or that gives a "clear answer to the question presented," this silence precluded federal habeas corpus relief. But the *Rodgers* panel distinguished *John-Charles* as involving a reassertion of the right to counsel at trial rather than in a post-trial motion. In the panel's view, the *Robinson* v. *Ignacio* counsel-at-sentencing rule remained binding notwithstanding *John Charles*. (Appendix A at 19-24.)

The *Rodgers* panel, finally, concluded that the state court had violated *Robinson's* so-called "clearly established" rule, allowing for revocation of the *Faretta* waiver post-trial, that supposedly governed Rodgers's Sixth Amendment claim. As the panel

explained it, the California Court of Appeal had erroneously reviewed the trial court's ruling for "abuse of discretion," and had erroneously upheld it because Rodgers had repeatedly switched between representation and self-representation and because he had failed to explain why representation by counsel was essential in the new-trial motion, despite Rodgers's own demonstrated knowledge of trial tactics and procedure. The *Rodgers* panel dismissed these conclusions of the state court as amounting to nothing more than the "discredited idea that, once waived, the right to counsel cannot be re-asserted at sentencing." (Appendix A at 26-27.)

Having held that the state court decision was "contrary" to "clearly established Federal law" under § 2254(d), the Ninth Circuit panel directed the district court to "remand" the matter to the state court to afford Rodgers assistance of counsel in preparing a new-trial motion. (Appendix A at 28.)

The State filed a petition for rehearing and a suggestion for hearing en banc (Appendix L). The Ninth Circuit denied it on June 28, 2012. (Appendix K.) The mandate issued on July 10, 2012. (Appendix J.)

3. Pursuant to the Ninth Circuit judgment, the district court on July 18, 2012, granted a "conditional" writ ordering that Rodgers "be brought before the Riverside County Superior Court within sixty days" for "the purpose of being appointed counsel for consideration of filing a new trial motion." (Appendix H, D.) The State asked the district court to extend the time for compliance with the conditional writ (Appendix G), but the district court refused on the theory that only this Court or the Court of Appeals could do that. (Appendix F.)

4. Rodgers has appeared in the Riverside Superior Court, where counsel has been appointed,

but the appointment is being reviewed and will not be resolved until October 15, 2012. In the meantime, the State is seeking a recall of the mandate and stay in the Court of Appeals. If that application is denied, the State will ask this Court for an order recalling the mandate and staying the judgment of the Ninth Circuit.

REASONS FOR GRANTING CERTIORARI

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH REPEATED HOLDINGS FROM THIS COURT STRICTLY LIMITING WHAT CONSTITUTES "CLEARLY ESTABLISHED FEDERAL LAW," CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS, AND UNNECESSARILY FRUSTRATES THE STATE'S SETTLED, REASONABLE, AND VALID SYSTEM FOR ACCOMMODATING ANY LEGITIMATE INTEREST OF THE DEFENDANT IN SEEKING POST-TRIAL APPOINTMENT OF COUNSEL EVEN AFTER WAIVER OF HIS RIGHTS UNDER *FARETTA*

Certiorari should be granted because, in ordering habeas corpus relief, the Ninth Circuit "decided an important question of federal law in a way that conflicts with relevant decisions of this Court." See Sup. Ct. R. 10. It asserted a continuing power to rely on circuit precedent to transmute general principles of law found in this Court's precedents into a specific rule that it then applied retroactively to the state court's handling of Rodgers's case. In doing so, the Ninth Circuit in essence adopted the conclusion that *Faretta*, which recognized the defendant's right to represent himself at trial, "clearly establishes" that the defendant may re-assert that previously waived right to counsel at a critical stage of the trial, such as a post-verdict new-trial motion, in the absence of "extraordinary

circumstances" or bad faith. And it did this even while acknowledging that this Court had never held or even addressed the question whether the defendant retained any constitutional right to withdraw his *Faretta* waiver of counsel at trial and require re-appointment of counsel in the context of a post-trial motion.

Even if this Court had clearly established that a new-trial motion is a "critical stage"—a proposition that seems to be a sufficiently debatable one—nothing in *Faretta* remotely addresses the question of revocation of waiver and re-assertion of the right to counsel. The Ninth Circuit's view of its power to extrapolate "clearly established Federal law" under § 2254(d) flies in the face of repeated rulings and instructions by this Court to the contrary.

It should be resolved, further, because the Ninth Circuit decision conflicts with that of other Circuits. And, as reflected in those Circuits and in the California cases, the California rule comports with the Constitution and the conflicting Ninth Circuit rule is wrong.

Moreover, the Ninth Circuit decision in this case represents the renewal of an unseemly contest between circuit-court jurisprudence and a settled California system for accommodating, when it appears called for, a defendant's request to revoke his earlier waiver of counsel for trial and to seek re-appointment of counsel post-trial. In this context, the state courts adhere to state jurisprudence entrusting such decisions to the reasonable exercise of the trial judge's discretion—and the federal courts repeatedly step in and frustrate the state's efforts. The spectacle of a contest of wills between state and federal courts ill serves comity and should be avoided where the state court has adopted a fair system that

reasonably may be said to conform with clearly established constitutional law.

A. The Ninth Circuit Decision Conflicts With Many Decisions of this Court Construing "Clearly Established Precedent" Under 28 U.S.C. § 2254(d).

Under the deferential-review standard of 28 U.S.C. § 2254(d), habeas corpus relief is precluded unless the state court decision was directly "contrary to," or an objectively "unreasonable application" of, federal constitutional law as "clearly established" only by the holdings of this Court's precedents at the time the state court decided his case. So, to obtain relief despite § 2254(d), respondent Rodgers was required to show that this Court itself had clearly established that, even after a *Faretta* waiver at trial, a defendant retains some constitutional entitlement to revoke the waiver after trial for the purpose of filing a new-trial motion (and, further, that he retained an entitlement on the specific facts of his case). But, as reflected in the Ninth Circuit's own acknowledgment, this Court has simply never spoken to the question of re-assertion of the right to counsel after a *Faretta* waiver in any context. Nonetheless, the Ninth Circuit in *Robinson* and, in turn, this case has purported to discern, from "general principles" in *Faretta* or other Supreme Court precedents that nowhere discuss revocation of a defendant's waiver and re-assertion of a purported right to appointment of counsel after the trial, a specific constitutional rule that presumptively allows revocation and re-assertion in that new context.

The Ninth Circuit's continued insistence that it remains free to discern such novel rules from "general principles" and to apply them retroactively

to defeat final state-court judgments is indistinguishable from *de novo* review of a constitutional claim under mere Circuit-court precedents. This business-as-usual approach is antithetical to the fundamental AEDPA reform put in place in 28 U.S.C. § 2254(d). And it is irreconcilable with this Court's repeated explanations, that "clearly established" law under § 2254(d), instead, denotes only the specific constitutional rules that this Court has squarely addressed and adopted.

This Court has repeatedly reversed the Ninth Circuit for granting habeas corpus relief in contravention of the deferential § 2254(d) standard.[2] More particularly, this Court has repeatedly reversed decisions from the Ninth Circuit and other circuits for failing to strictly interpret what constitutes "clearly established Federal law" under § 2254(d). In doing so, this Court has repeatedly made it clear that lower federal courts may not grant relief to a state prisoner based on their own views of the Constitution or based on their own specific-rule extrapolations from "general principles" recognized in this Court's precedents.

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[2] *See Cavazos* v. *Smith*, 132 S. Ct. 2 (2011) (per curiam); *Premo* v. *Moore*, 131 S. Ct. 733 (2011); *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011); *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011); *Harrington* v. *Richter*, 131 S. Ct. 770 (2011); *Waddington* v. *Sarausad*, 555 U.S. 179 (2009); *Knowles* v. *Mirzayance*, 556 U.S. 111(2009); *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008) (per curiam); *Uttecht* v. *Brown*, 551 U.S. 1 (2007); *Schriro* v. *Landrigan*, 550 U.S. 465 (2007); *Carey* v. *Musladin*, 549 U.S. 70 (2006). *Rice* v. *Collins*, 546 U.S. 333 (2006); *Yarborough* v. *Alvarado*, 541 U. S. 652 (2004); *Lockyer* v. *Andrade*, 538 U.S. 63, (2003); *Woodford* v. *Visciotti*, 537 U.S. 19 (2002).

Most recently, this Court in *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (per curiam), held that the Sixth Circuit erred by consulting its own precedents, rather than those of this Court, in assessing the Kentucky Supreme Court's decision under § 2254(d). After quoting the governing prosecutorial-misconduct standard from this Court's decision in *Darden* v. *Wainwright*, 477 U.S. 168 (1986), the Sixth Circuit had evaluated the claim in light of four factors derived from its own precedent: "'(1) the likelihood that the remarks . . . tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against [Matthews].' " *Id.* at 651 F.3d, at 506. It then concluded that "the prosecutor's comments in this case were sufficiently similar to" certain comments held unconstitutional in its prior decision in *Gall* v. *Parker*, 231 F.3d 265 (6th Cir. 2000) (*Gall II*), "that they rise to the level of impropriety." *Id.*

Summarily reversing, this Court made it clear that the methodology employed by the Sixth Circuit, consulting its own precedents, was error identical to the error it had committed in a similar case decided two Terms earlier in *Renico* v. *Lett*, 130 S. Ct. 1855 (2010). This Court explained that circuit precedent did not constitute "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), so it therefore could not form the basis for habeas relief under AEDPA. Nor, in this Court's view, could the Sixth Circuit's reliance on its own precedents be defended on the ground that they merely reflect what has been "clearly established" by this Court's cases. As this Court explained, the "highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears

scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here." *Parker*, 132 S. Ct. at 2155. This Court further noted that, beyond this error, the Sixth Circuit had made matters worse by relying on *Gall II*, a pre-AEDPA case, so that *Gall II* did not even purport to reflect clearly established law as set out in this Court's holdings. This Court bluntly concluded: "It was plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting Matthews habeas relief." *Parker*, 132 S. Ct. at 2155-56.

Similarly, in *Wright* v. *Van Patten*, 552 U.S. 120 (2008) (per curiam), this Court reversed the Seventh Circuit for granting habeas corpus relief on the theory that the defendant had been denied his right to counsel when his lawyer participated in the defendant's plea-bargain proceedings only by speakerphone without being physically present in court. The Seventh Circuit had held that it was clearly established that such conduct by the lawyer amounted to a "complete denial of counsel" that required automatic relief under this court's rule in *United States* v. *Cronic*, 466 U.S. 648 (1984), without inquiring into actual prejudice as would be required under this court's rule in *Strickland* v. *Washington*, 466 U.S. 668 (1984). This Court reversed under § 2254(d), explaining that "[n]o decision of this Court . . . "squarely addresses" the issue in this case, or clearly establishes that *Cronic* should replace *Strickland* in this novel context. Our precedents do not clearly hold that counsel's participation by speakerphone should be treated as a 'complete denial of counsel' on par with total absence." *Van Patten*, 552 U.S. at 125. The general principle identified by the Seventh Circuit that a defendant's is entitled to relief "if his defense counsel was actually or constructively absent at a critical stage of the

proceedings," was insufficient to clearly establish that participation by phone was tantamount to constructive absence. Instead, this Court's precedents "g[a]ve no clear answer" to that question. 552 U.S. at 125-26.

Kane v. *Garcia-Espitia*, 546 U.S. 9 (2005) (per curiam), is another example much like this case. In *Garcia-Espitia*, the Ninth Circuit deduced from *Faretta* a purported "clearly established" rule that a *pro se* defendant must be afforded access to a law library. In reversing the Ninth Circuit, this Court explained that "*Faretta* does not, as § 2254(d) requires, 'clearly establish' the law library access right. In fact, *Faretta* says nothing about any specific legal aid the State owes a pro se criminal defendant." Here, similarly, the Ninth Circuit deduced from *Faretta* a corollary revocation "right" that *Faretta* never addressed.

Also, in *Knowles* v. *Mirzayance*, 556 U.S. 111 (2009), the Ninth Circuit deduced, from this Court's generalized *Strickland* principle that counsel must perform in a reasonably competent way, a more specific rule that counsel acts incompetently if he forgoes a potential defense where there "was nothing to lose" by asserting it. Again reversing the Ninth Circuit, this Court explained, "[T]his Court has held on numerous occasions that it is not an 'unreasonable application of' clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been *squarely established* by this Court." *Id.* at 122.

Carey v. *Musladin*, 549 U.S. 70, is yet another close example. Musladin complained that his jury was tainted by viewing lapel buttons worn in the courtroom to support the victim of the charged crime. The Ninth Circuit deduced from this Court's precedents in *Estelle* v. *Williams*, 425 U.S. 501

(1976), and *Holbrook* v. *Flynn*, 475 U.S. 560 (1986)—which had addressed only the conduct of state representatives in the courtroom—a general principle prohibiting "inherently prejudicial" courtroom practices; and then it relied on its own circuit precedent, *Norris* v. *Risley*, 918 F.2d 828 (9th Cir. 1990), for its "persuasive value" in condemning the wearing of victim-support buttons by courtroom spectators as unconstitutionally prejudicial under those principles. Reversing the Ninth Circuit again, this Court explained that, even though *Williams/Flynn* had previously articulated a general test for state conduct that might prejudice the jury, "[t]his Court has never addressed a claim that such private-actor conduct . . . deprived a defendant of a fair trial." "As "[n]o holding of this Court required the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectators' conduct here," this Court explained, the California court's decision was not contrary to or an unreasonable application of clearly established federal law. *Musladin*, 549 U.S. at 77. (This Court also cited that proposition as a basis for reversing the Ninth Circuit in *Harrington* v. *Richter*, 131 S. Ct. at 780; and it did so, again, reversing the Ninth Circuit in *Schriro* v. *Landrigan*, 550 U.S. at 467.) If one reads *Faretta* for *Williams/Flynn* as stating this Court's "general principles," and reads *Robinson* for *Norris* as the "persuasive" Ninth Circuit extrapolation from those principles, Rodgers's case here parallels that of *Musladin*.

Just like *Parker*, the same "plain and repetitive" error lies at the heart of the Ninth Circuit's decision in respondent Rodgers's case. The Ninth Circuit inferred, from the *Faretta* principle, that the defendant may waive counsel and represent himself at trial, a debatable specific rule holding that the

defendant may revoke his waiver following trial and demand appointment of counsel in the specific context of pursuing a new trial motion. Then, it retroactively applied that rule to defeat a final state-court judgment that at all times had complied with and had never departed from this Court's "clearly established" law. Section 2254(d) and this Court's precedents forbid that result.

In addition, the methodology embraced by the Ninth Circuit panel in the published *Rodgers* opinion will serve as a continuing model that would result in avoidance of § 2254(d) deference for other sorts of constitutional claims in cases litigated in the Ninth Circuit. This will have a continued deleterious effect beyond this case and beyond the *Faretta* issue.

B. The Ninth Circuit Decision Is Wrong And Conflicts With The Decisions Of Other Circuits In Finding A Constitutional Right To Withdraw A *Faretta* Waiver And Require Appointment Of Counsel Post Verdict.

Preferring its own rule, the Ninth Circuit here condemned the state court because "it incorrectly applied an abuse of discretion standard in determining that the trial court did not violate the defendant's Sixth Amendment rights." (Appendix A at 26.) Even beyond the "clear and repetitive" error in violating this Court's holdings on discerning "clearly established law," certiorari is warranted here because the Ninth Circuit's no-discretion rule conflicts with the views of other federal circuit courts of appeals. And, as reflected in the law of those other circuits, the California rule is correct and the Ninth Circuit rule is wrong.

In California, once a defendant has commenced trial representing himself, it is within the sound discretion of the trial court to determine whether he may change his mind and assert the right to appointment of counsel. *People* v. *Gallego*, 52 Cal. 3d 115, 163-64, 802 P.2d 169, 276 Cal. Rptr. 679 (1990); *People* v. *Elliott*, 70 Cal. App. 3d 984, 993, 139 Cal. Rptr. 205 (1977). In exercising that discretion, the trial court may consider: "(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." *Elliott*, 70 Cal. App. 3d at 993-94; accord, *People* v. *Lawrence*, 46 Cal. 4th 186, 192, 205 P.3d 1062, 92 Cal. Rptr. 3d 613 (2009). A court may also consider the defendant's motive in asking to withdraw a *Faretta* waiver. *People* v. *Ngaue*, 229 Cal. App. 3d at 1126. However, these criteria are "no absolutes," and it is "the totality of the facts and circumstances" that the trial court must consider in determining whether to permit a defendant to again change his mind regarding representation. *Lawrence*, 46 Cal. 4th at 192-93; *Gallego*, 52 Cal. 3d at 164; *Smith*, 109 Cal. App. 3d at 484."

The Ninth Circuit, however, exalted its own no-discretion rule over California's reasonable accommodation of the defendant's asserted interests, which entrusts the decision to the sound discretion of the trial judge most familiar with the defendant's conduct and capabilities. But the Ninth Circuit rule conflicts with that of other federal circuits. See

United States v. *Solina*, 733 F.2d 1208, 1211 (7th Cir. 1984) (trial judge acted within court's *discretion* in denying reappointment of counsel); *United States* v. *Paternostro*, 966 F.2d 907, 911 (5th Cir.1992) (no constitutional error in denying request for continuance to obtain counsel by defendant/lawyer who had represented himself at trial and now sought to retain counsel for sentencing); *United States* v. *Leveto*, 540 F.3d 200, 207 (3d Cir. 2008) (reviewing the case law and identifying the considerations that should guide the trial judge in deciding whether to grant a post-waiver request for counsel by a pro se defendant, and applying a "clearly erroneous" standard of review as to a denial of that request; here, an inquiry into the defendant's reasons for his shift in position was not needed as the trial court had been made fully aware of the relevant concerns without holding a "formal colloquy.") The Ninth Circuit's conflict with these other circuits thus stands as a further reason justifying a grant of certiorari.

Moreover, as these same cases make clear, there is and there should be no rigid rule requiring the state court to recognize a defendant's post-verdict effort to withdraw his valid *Faretta* waiver in order to purse a new-trial motion. Rather, as these federal cases and the California cases show, a more broadly recognized approach is one leaving any reasonable decision in the hands of the trial judger. As these cases reflect, California's approach conforms with the Constitution. The Ninth Circuit's approach is wrong and should be corrected to resolve the circuit-vs.-circuit and the circuit-vs.-California conflict to which it gives rise.

C. The Ninth Circuit Decision Undermines Comity Because it Renews a Chronic Contest Between the Federal and State Courts and Frustrates the State's Reasonable Rule for Dealing With Post-Trial Efforts to Revoke Valid *Faretta* Waivers

Certiorari is appropriate, further, to put an end to an unseemly conflict between California and Ninth Circuit jurisprudence that ill serves comity. Application of an "abuse of discretion" rule to a defendant's request for appointment of post-trial counsel after a *Faretta* waiver at trial is well established in the state courts. See *Ngaue,* 229 Cal. App. 3d at 1123-24 (contrasting the Ninth Circuit's *Menefield* test); *People* v. *Smith*, 109 Cal. App. 3d 476, 484, 167 Cal. Rptr. 303 (Ct. of App. 1980); *People* v. *Elliott*, 70 Cal. App. 3d 984. *see also People* v. *Callego*, 52 Cal. 3d 115 (regarding discretion and mid-trial motion). The Ninth Circuit's decision here is not an isolated case of error, but instead is part of a more chronic and recurring federal-state conflict on what the law permits in the area of revocation of *Faretta* waivers. The panel's opinion in this case again renews the conflict originating in 1989 with *Menefield* v. *Borg;* and it will persist, with further grants of habeas relief upsetting state court opinions that rely on the state's abuse-of-discretion rule, in the future. A grant of certiorari, and reversal of the Ninth Circuit here, would be appropriate to de-fuse it. The damage to comity is especially unfortunate because it is so unnecessary here. The state abuse-of-discretion rule is reasonable, conforms with that of other federal courts, and does not conflict with clearly established law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 25, 2012

APPENDIX A

FILED May 17, 2012

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OTIS LEE RODGERS, Petitioner-Appellant,
v.
JOHN MARSHALL, Warden,
Respondent-Appellee.

No. 10-55816
D.C. No. 5:08-cv-01003-VAP-MLG

OPINION

On Appeal from the United States District Court for the Central District of California, Virginia A. Phillips, District Judge, Presiding.

Argued and Submitted January 12, 2012—
Pasadena, California

Filed May 17, 2012

Before: STEPHEN REINHARDT and WILLIAM A. FLETCHER, Circuit Judges, and JACK ZOUHARY, District Judge.FN*

Opinion by Judge Zouhary

FN* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

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OPINION

ZOUHARY, District Judge:

INTRODUCTION

In June 2003, a jury found Petitioner–Appellant Otis Lee Rodgers ("Rodgers") guilty of assault with a firearm, possession of a firearm and ammunition by a felon, and making criminal threats, as well as two sentencing enhancement allegations. Rodgers was sentenced and is currently serving a sixteen-year prison term.

After exhausting state court remedies, Rodgers filed a petition for a writ of habeas corpus in federal court, raising twenty-one claims for relief. The district court denied the petition, but granted Rodgers a limited certificate of appealability regarding his claim that the state trial court violated his Sixth Amendment right to counsel by denying his timely request for representation to file a new trial motion. In addition to the certified issue, Rodgers argues there was insufficient evidence to support the charge of criminal threats, and the state court unreasonably affirmed an upper term sentence in the absence of proof to a jury beyond a reasonable doubt. We decline to address those uncertified issues.

This case requires us to consider whether a criminal defendant's request for legal counsel to file a

post-verdict motion for a new trial is a "critical stage," and whether denying such a request, because the defendant previously waived his right to trial counsel, is a violation of clearly established federal law. For the reasons set forth below, the judgment of the district court is **REVERSED**, and this case is **REMANDED** for further proceedings.

BACKGROUND

Procedural Background

In June 2003, a jury found Rodgers guilty of several state charges. The jury also found two sentencing enhancements, and Rodgers was sentenced to sixteen years in prison. Rodgers appealed the judgment to the California appellate court which affirmed his convictions and sentence in August 2005.

Rodgers filed a petition for review with the California Supreme Court, but his petition was dismissed in July 2007. While Rodgers' petition for review was pending, he filed habeas petitions with the California appellate court and the California Supreme Court challenging the search of his vehicle. Although Rodgers was represented by appellate counsel, he also filed numerous *pro per* motions, post-conviction pleadings, and writ applications in the California appellate court and the California Supreme Court, including several motions for substitution of appellate counsel. The appellate courts rejected all those petitions and claims.

In July 2008, Rodgers filed a petition for writ of habeas corpus in federal court raising twenty-one claims for relief, including denial of right to counsel at the post-trial stages for new trial motions and sentencing. The California Attorney General answered the Petition in April 2009, arguing the state court rejected Rodgers' claim on the merits, and

the court's decision was neither contrary to, nor an unreasonable application of, controlling United States Supreme Court precedent.

The petition was referred to the magistrate judge in March 2010, who recommended dismissal. Rodgers filed objections and, in May 2010, the district judge approved the magistrate's recommendation and also granted a certificate of appealability as to only one claim—whether the trial court violated Rodgers' Sixth Amendment by denying his request for the appointment of counsel to file a new trial motion. For all other claims, the district court found Rodgers could not "make a colorable clain that jurists of reason would find debatable or wrong." Rodgers filed this timely appeal.

Factual Background

Early in the morning on July 15, 2001, a woman was awakened by screaming and yelling from the parking lot of a nearby apartment complex. The woman looked through her window and saw an African American man and a woman near a red car in the parking lot. Events later established the man was Otis Lee Rodgers and the woman, his wife Joyce Rodgers. Rodgers, who was calling Joyce a prostitute and threatening to kill her, hit her in the head with his fist and told her to "[g]ive me the fucking gun." Joyce retrieved a gun from the car and gave it to Rodgers, who then placed the gun to her head and said he was going to kill her. Joyce was crying. These events were also witnessed by the woman's eleven-year old daughter.

The woman made an anonymous 911 call and, while talking to the dispatcher, saw a patrol car pass by the parking lot. She informed the dispatcher that the patrol car needed to turn around. The Riverside County deputy sheriff who was driving the patrol car

had previously received a radio dispatch that a man and woman were in a red sedan in the apartment complex parking lot, and that the man threatened to shoot the woman. Rodgers was leaving the parking lot in the red sedan as the deputy approached. Joyce was in the passenger seat—upset and crying. Rodgers told the deputy that he and Joyce had been arguing over financial problems. After discovering Rodgers did not have a driver's license, the deputy placed him in the back of the patrol car. Joyce told the deputy that Rodgers had not threatened or assaulted her.

A second deputy sheriff who arrived at the scene as backup observed several fresh gouge wounds on Joyce's shoulders. Joyce told the deputy she and Rodgers had been arguing and that she scraped her shoulders on a nail that was sticking out of a wall. With Joyce's consent, the first deputy searched Rodgers' car. The deputy found a .357 magnum revolver and ammunition inside the trunk. Rodgers was arrested and charged with several violations of the California Penal Code.

During the pretrial phase of his case, which lasted nearly two years, Rodgers alternated requests for counsel and self-representation. Between July and December 2001, Rodgers represented himself for arraignment and at hearings on motions prepared *pro per*. Rodgers retained counsel for a January 2002 preliminary hearing; however, in March 2002, the trial court granted his motion for self-representation. In May 2002, upon Rodgers' request, the trial court appointed a public defender. Four months later, Rodgers again decided to go it alone, but the trial court denied his motion to proceed *pro per*. In November 2002, the trial court relieved the public defender due to a conflict of interest and appointed a defense panel attorney to continue Rodgers'

representation. Rodgers sought and received permission to represent himself in February 2003, and continued to represent himself throughout trial.

At trial, Rodgers called several witnesses and testified on his own behalf. Rodgers testified that on the night of the incident, he and Joyce went to a club and then drove to a parking lot near a friend's home. Other cars, including a red car, were also in the parking lot, along with other African American males and females. Rodgers and Joyce waited in their car for their friend to return from the club. About thirty to forty-five minutes later, Rodgers noticed police cars "zooming around." As Rodgers was leaving the parking lot, a deputy pulled up. After asking Rodgers some questions about his driver's license, the deputy placed Rodgers in the back of the patrol car. According to Rodgers, the deputy then took a plastic bag containing a dark object out of the patrol car, went to Rodgers' car, opened the trunk, and returned with the bag that had previously been in the patrol car.

In June 2003, a jury found Rodgers guilty of assault with a firearm, possession of a firearm and ammunition by a felon, and making criminal threats. The jury also found Rodgers personally used a firearm while committing the assault and making the criminal threats and that Rodgers was on bail pending trial for another felony offense when he committed these crimes. In addition, Rodgers admitted he had two prior felony convictions, had been sentenced to prison on each of them, and that within five years of release from custody he committed another felony.

Immediately following the reading of the verdict, Rodgers informed the trial court he wished to file a motion for new trial. Rodgers also requested the reappointment of the defense panel attorney to

prepare the new trial motion. The trial court denied Rodgers' request, stating "[w]e aren't doing anything like that right now, Mr. Rodgers." One month later, Rodgers filed a written motion again requesting the appointment of counsel "to perfect and file" a motion for new trial. The trial court denied his motion, reminding Rodgers that he "made th[e] election to represent [him]self" and insisted on self-representation even after being counseled against it.

Rodgers insisted he wanted to file a motion for new trial and if need be he himself would prepare the motion, but he needed a copy of the trial transcript and two months to "perfect the motion." Rodgers asserted he had ten to fifteen grounds for his new trial motion, including claims based on newly discovered evidence and prosecutorial misconduct during closing argument. The trial court denied his request for the transcript.

Subsequently, Rodgers filed his new trial motion, along with a motion to continue sentencing. At the sentencing, the court asked Rodgers if there was any reason why sentencing should not proceed. Rodgers responded he needed additional time to review his probation report and prepare a sentencing brief; however, the trial court denied his request for a continuance and proceeded with sentencing.

When the trial court and the prosecutor began to discuss the possible length of his sentence, Rodgers informed the court he was unfamiliar with the applicable sections of the California Penal Code in his case and asked that they be explained to him. The trial court responded, "Mr. Rodgers, if you had a lawyer, he could explain it to you." Rodgers did not request appointment of counsel for sentencing, but did ask that he be allowed to bring his family members to court to speak on his behalf. The court obliged and continued the matter for two days.

When the hearing reconvened, Rodgers again expressed frustration and confusion with the statutory sentencing provisions:

> RODGERS: Again, Your Honor, you are disrespecting me and talking to him not me.
>
> COURT: That's because you don't know what I am talking about, Mr. Rodgers.
>
> RODGERS: That's what I understand. That's no excuse.
>
> COURT: I told you at the time that you did this that you would be held to the same standards as a lawyer. You are being held to the same standards as a lawyer. That's an election you made.
>
> RODGERS: I don't know why this is such a discrimination against pro per.
>
> COURT: Not discriminating you [sic], sir. You are held to the same standards as a lawyer.

Rodgers now claims that by refusing to appoint counsel for the motion for new trial, the trial court violated his Sixth Amendment right to counsel at a critical stage in the proceedings.[FN1]

> FN1. The certified issue does *not* include Rodgers' argument that he was denied counsel during sentencing. Instead of including the issue in his brief as an uncertified issue under Ninth Circuit Rule 22(e), Rodgers improperly included it as part of the certified issue. Even if we addressed Rodgers' argument, he would not be entitled to relief. Although it is clearly established law that sentencing is a "critical stage" of a criminal proceeding, *see* *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), the California appellate court held Rodgers

> "never requested the appointment of counsel for his sentencing hearing," and "the only request he made for counsel was his July 16, 2003, motion for counsel which was expressly 'to perfect and file defendant's Motion for a New Trial.' " This finding, supported by the record, constitutes "a determination of a factual issue made by a State court," and as such, is "presumed to be correct." *See* 28 U.S.C. § 2254(e). Because Rodgers has not met the difficult "burden of rebutting the presumption of correctness by clear and convincing evidence," this Court must defer to the state court's factual determination. *Id.*

JURISDICTION

This is an appeal of right from a judgment of the district court, which had jurisdiction under 28 U.S.C. § 2254. The district court entered judgment on May 4, 2010, which was timely appealed on May 17, 2010. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 2253(a).

STANDARD OF REVIEW

Section 2254 provides federal habeas corpus relief to state prisoners who are in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A district court's decision to deny a habeas petition under Section 2254 is reviewed *de novo*. *Alvarado v. Hill*, 252 F.3d 1066, 1068 (9th Cir.2001); *Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir.2000). Its findings of fact are reviewed for clear error. *Solis*, 219 F.3d at 926. A state court's findings of fact are entitled to a presumption of correctness unless the petitioner rebuts the presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Solis*, 219 F.3d at 926.

Because Rodgers' petition was filed after the Anti–Terrorism and Effective Death Penalty Act's ("AEDPA") effective date of April 24, 1996, its provisions apply. *See Woodford v. Garceau*, 538 U.S. 202, 205–06 (2003).

In short, AEDPA imposes a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997), and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Under AEDPA, this Court cannot grant habeas relief unless the state court decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

The Supreme Court has made clear the "contrary to" and "unreasonable application" clauses have distinct meanings. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court decision is contrary to clearly established federal law where the court fails to apply the correct controlling authority; or if it applies controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result. *Id.* at 413–14; *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court decision involves an unreasonable application of clearly established federal law if the state court identifies the correct governing legal principle from Supreme Court precedent, but unreasonably applies that principle to the facts of the case, or unreasonably extends a legal principle to a new context where it should not apply, or fails to extend the principle to a context in which it should apply. *Williams*, 529 U.S. at 407; *Brown*, 544

U.S. at 141. The state's application of federal law "must be shown to be not only erroneous, but objectively unreasonable." *Waddington v. Sarausad*, 555 U.S. 179, 190 (quotation omitted).

Furthermore, AEDPA's "clearly established law" requirement limits the area of law on which habeas courts may rely—the only definitive source of federal law is Supreme Court precedent. *See Williams*, 529 U.S. at 412; *Mendez v. Knowles*, 556 F.3d 757, 767 (9th Cir.2009). Circuit precedent may provide "persuasive authority" for purposes of determining whether a state court decision is an "unreasonable application" of Supreme Court precedent. *Id.* at 767. However, only Supreme Court holdings are binding on state courts, and "only those holdings need be reasonably applied." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir.2003); *see also Williams*, 529 U.S. at 412.

When applying these standards, this Court must review the "last reasoned state court decision." *Delgadillo v. Woodford*, 527 F.3d 919, 925 (9th Cir.2008); *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir.2002). Here, the California Supreme Court denied Rodgers' Sixth Amendment claim without issuing a reasoned decision. Therefore, the August 2005 decision of the California appellate court, denying Rodgers' Sixth Amendment claim on direct review, is the last reasoned decision of a California court, and the decision we must review.

ANALYSIS

With these principles in mind, we now turn to Rodgers' challenge to the state court's ruling on his Sixth Amendment claim, which requires this Court to answer three specific questions. First, whether the pre-appeal time period for filing a motion for new

trial is a "critical stage" under "clearly established federal law;" if so, then whether denying a request for counsel at that stage, because a defendant previously waived his right to trial counsel, is a violation of "clearly established federal law;" and, if so, whether the California appellate court decision was "contrary to, or involved an unreasonable application of" clearly established law.

A Post–Verdict New Trial Motion is a "Critical Stage"

[1] The Supreme Court's Sixth Amendment jurisprudence has long recognized that a defendant's right to counsel is a fundamental component of our criminal justice system. *See Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004); *United States v. Cronic*, 466 U.S. 648, 653–54 (1984). Indeed, "[w]ithout the aid of counsel, a defendant may be unable to prepare an adequate defense and though 'he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' " *Robinson v. Ignacio*, 360 F.3d 1044, 1056 (9th Cir.2004) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). For that reason, the right to counsel, which originated as a trial right, has been extended by the Supreme Court to various "critical stages," which the Court defines as any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa*, 389 U.S. at 134

[2] Although the Supreme Court has provided specific examples of "critical stages" under the Sixth Amendment, it has never squarely addressed whether a post-verdict motion for new trial is one of those stages. *E.g., Estelle v. Smith*, 451 U.S. 454, 474 (1981) (psychiatric interviews); *Mempa*, 389 U.S. at 134 (sentencing); *United States v. Wade*, 388 U.S. 218, 224–25 (1967) (pretrial line up); *White v.*

Maryland, 373 U.S. 59, 60 (1963) (preliminary hearings); *Douglas v. California*, 372 U.S. 353, 355–56 (1963) (appeals). However, the Supreme Court's "silence on this particular issue need not prevent us from identifying and applying the [Court's] general governing principles to the case at hand." *Ignacio*, 360 F.3d at 1056–57. As explained in *Ignacio*, "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Id.* at 1057 (quoting *Williams*, 529 U.S. at 382 (opinion of Stevens, J.)[FN2]).

> FN2. The language quoted in *Ignacio* is taken from Part II of Justice Stevens' opinion in *Williams*, which was joined only by four justices. A majority of the Court instead joined Part II of Justice O'Connor's opinion, which disagreed with Justice Stevens' "erroneous interpretation" of AEDPA due to his failure to "give independent meaning to both the 'contrary to' and 'unreasonable application' clauses of the statute." *Williams*, 529 U.S. at 404. However, we do not interpret Justice O'Connor's opinion as inconsistent with that of Justice Stevens regarding AEDPA's "clearly established Federal law" requirement. Justice O'Connor specifically agreed with Justice Stevens that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law' " under § 2254(d)(1), with the significant "caveat" that, unlike *Teague*, "§ 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." *Id.* at 412.

Some of our sister circuits have likewise recognized that AEDPA encompasses more than

"bright-line rules" laid down by the Supreme Court. *See, e.g., Taylor v. Withrow*, 288 F.3d 846, 850 (6th Cir.2002) ("The [Supreme] Court has made clear that its relevant precedents include not only bright-line rules but also the legal principles and standards flowing from precedent."); *Hart v. Attorney General of Florida*, 323 F.3d 884, 893 n. 16 (11th Cir.2003).

This Circuit recognizes that, because of AEDPA, we "can no longer reverse a state court decision merely because that decision conflicts with Ninth Circuit precedent on a federal Constitutional issue." *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir.2000). For that reason, Rodgers misplaces his reliance on this Court's opinion in *Menefield v. Borg*, which held that a post-verdict motion for a new trial is a "critical stage" of prosecution under the Sixth Amendment. 881 F.2d 696 (9th Cir.1989). However, as discussed above, Ninth Circuit precedent "may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help us determine what law is 'clearly established.' " *Duhaime*, 200 F.3d at 600. Therefore, when faced with novel situations, "we may turn to our own precedent, as well as the decisions of other federal courts, in order to determine whether the state decision violates the general principles enunciated by the Supreme Court and is thus contrary to clearly established federal law." *Ignacio*, 360 F.3d at 1057.

[3] The Supreme Court's Sixth Amendment doctrine concerning a defendant's right to counsel is not a bright-line rule. In *United States v. Ash*, the Court recognized that the right to counsel encompassed a "test" which requires an "examination of the event [at issue] in order to determine whether the accused required aid in coping with legal

problems or assistance in meeting his adversary." 413 U.S. 300, 313 (1973) (relying on the "history and expansion of the Sixth Amendment counsel guarantee"). Similarly, in *Mempa*, the Court held a "critical stage" involves aspects of the criminal prosecution "where substantial rights of a criminal accused may be affected." 389 U.S. at 134.

There is no doubt a post-verdict motion for new trial is one of those aspects of the prosecution. As this Court held in *Menefield*, "the motion for a new trial is the defendant's last opportunity for an unconstrained review on the merits of the evidence against him." 881 F.2d at 699. This is so because on appeal, "both jury conclusions and the factual decisions of the trial court are either immune from review or treated under a highly deferential standard." Id. Not only can counsel ensure that a defendant's substantive rights are protected, but counsel can also utilize his "understanding of legal rules and his experience in presenting claims before a court," which is ordinarily required for an effective new trial motion. Id. To be sure, "[t]he presence of trained counsel at this stage insures that the most favorable arguments will be presented and 'that the accused's interests will be protected consistently with our theory of criminal prosecution.' " *Id.* (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)).

[4] For those reasons, we were compelled to hold that a post-verdict new trial motion is a "critical stage" under the Sixth Amendment. *See Menefield*, 881 F.2d at 699. In so holding, we identified and relied solely on Supreme Court precedent. *Id.* at 698–99 (citing *Mempa*, 389 U.S. at 134 and *Ash*, 413 U.S. at 315). This fact was recognized in *Bell v. Hill*, where we reaffirmed Menefield relied "exclusively on Supreme Court precedent addressing the Sixth Amendment right to counsel" in finding that "the

right to counsel attaches to the motion for a new trial stage." 190 F.3d 1089, 1092 (9th Cir.1999).[FN3]

> FN3. *Bell*, a case decided under *Teague v. Lane*, 489 U.S. 288 (1989), is consistent with the holding in *Williams* that whatever qualifies as an old rule under *Teague* constitutes "clearly established federal law" under Section 2254(d)(1). See *Williams*, 529 U.S. at 412. But we recognize that *Bell* also presents another question, namely, whether *Menefield* satisfies the Court's caveat that "the *source* of clearly established law" is Supreme Court jurisprudence. *Id.* (emphasis added). Though we are persuaded that Supreme Court jurisprudence was indeed the "source" of *Menefield's* rule that the right to counsel attaches to the motion for a new trial, we sidestep that question by holding, as discussed *infra*, that the Supreme Court's Sixth Amendment "critical stage" jurisprudence establishes a legal principle that "clearly extends" to the pre-appeal motion for new trial. *See Murdoch v. Castro*, 609 F.3d 983, 992 (9th Cir.2010).

The parties to this case argued that a split exists among the appellate circuits as to whether a post-verdict motion for new trial is a "critical stage" under the Sixth Amendment. They are wrong. Upon careful review, every federal circuit that has addressed whether a post-trial, pre-appeal motion for a new trial constitutes a "critical stage" has concluded that it does. *See, e.g., McAfee v. Thaler*, 630 F.3d 383, 393 (5th Cir.2011); *Kitchen v. United States*, 227 F.3d 1014, 1019 (7th Cir.2000); *Williams v. Turpin*, 87 F.3d 1204, 1210 & n. 5 (11th Cir.1996); *Robinson v. Norris*, 60 F.3d 457, 460 (8th Cir.1995); *Menefield*, 881 F.2d at 699; *see also Nelson v. Peyton*, 415 F.2d 1154, 1157 (4th Cir.1969); *Baker v. Kaiser*,

929 F.2d 1495, 1499 (10th Cir.1991) (quoting *Nelson*, 415 F.2d at 1157).

The majority of these courts focus on the timing of the motion for new trial. For instance, the Fifth, Seventh and Eighth Circuits, all distinguish between post-trial motions filed prior to an appeal, which the courts consider "not collateral," and those filed after an appeal, which are deemed "collateral." *See, e.g., McAfee*, 630 F.3d at 393; *Kitchen*, 227 F.3d at 1019; *Robinson*, 60 F.3d at 459–60. In addition to timing, some of these courts focus on the nature of the motion, and rely on the general policies ensuring effective representation in our adversary system. *See, e.g., Williams*, 87 F.3d at 1210.

The parties point to three circuits that appear to have reached a contrary result; however, those circuits did not address the specific issue here. *See United States v. Tajeddini*, 945 F.2d 458, 470 (1st Cir.1991), *abrogated on other grounds, Roe v. Flores–Ortega*, 528 U.S. 470 (2000); *United States v. Lee*, 513 F.2d 423, 424 (D.C.Cir.1975); *United States v. Birrell*, 482 F.2d 890, 892 (2d Cir.1973). That is, those circuits did not consider whether the post-trial, pre-appeal time period for filing a motion for new trial is a "critical stage" under the Sixth Amendment. Instead, those courts categorized the motions at issue as "collateral" because they were filed after direct appeals were exhausted, a result consistent with the Supreme Court's holding that the right to counsel ceases to exist after a defendant's first appeal. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further."). We have found no case that holds the pre-appeal time period is not a "critical stage."[FN4]

FN4. At least one other circuit has made the same finding. *See McAfee*, 630 F.3d at

> 393 ("Every federal circuit court to address the question of whether the post-trial, pre-appeal time period for making a motion for new trial is a critical stage has concluded that it is.").

[5] Accordingly, guided by this "persuasive authority," *Mendez*, 556 F.3d at 767, we conclude that it is clearly established Supreme Court law that a pre-appeal motion for new trial is a "critical stage" under the Sixth Amendment. This conclusion is in accord with the Supreme Court's longstanding recognition that the right to counsel is one of the most fundamental in our criminal justice system. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *Penson v. Ohio*, 488 U.S. 75, 84 (1988). For this reason, examples are legion where the Supreme Court applied its "critical stages" jurisprudence to particular fact-patterns, including psychiatric interviews, sentencings, pretrial line ups, preliminary hearings, and appeals. The Supreme Court's Sixth Amendment "critical stage" jurisprudence establishes a legal principle that "clearly extends" to the context of a pre-appeal motion for new trial. *See Murdoch v. Castro*, 609 F.3d 983, 992 (9th Cir.2010). A contrary conclusion would represent an unreasonable application of that principle. *See Williams*, 529 U.S. at 407.

Re-Asserting the Right to Counsel After a *Faretta* Waiver

Before reviewing the state court's decision to determine whether it was contrary to, or involved an unreasonable application of, "clearly established federal law," we next address whether a criminal

defendant can re-assert the right to counsel after previously waiving it.

[6] The state court's rejection of Rodgers' claim turned on the application of the California standard governing the reappointment of counsel previously waived. Therefore, our finding that the right to counsel for a new trial motion is "clearly established" does not end our inquiry. This Court must also determine whether the denial of Rodgers' request for counsel to file such a motion because he previously waived his right to trial counsel was contrary to, or involved an unreasonable application of, clearly established law.

[7] While the Sixth Amendment's guarantee of the right to counsel at all "critical stages" has been long established, the Supreme Court has also recognized that a criminal defendant has a "reciprocal constitutional right to 'proceed without counsel when he voluntarily and intelligently elects to do so.' " *John–Charles v. California*, 646 F.3d 1243, 1248 (9th Cir.2011) (quoting *Faretta v. California*, 422 U.S. 806, 807 (1975)). As we have previously acknowledged, "the Supreme Court has never explicitly addressed a criminal defendant's ability to re-assert his right to counsel ... after a previous waiver of that right during trial...." *Ignacio*, 360 F.3d at 1056. However, applying the Supreme Court's general governing principles described above, we previously determined it is "clearly established federal law" that a defendant's reassertion of the right to counsel at a separate, post-trial proceeding cannot be denied simply "on the grounds that the defendant has previously waived that right." *Id.* at 1059. We abide by our earlier holding.

In *Robinson v. Ignacio*, a case with strikingly similar facts to this case, a habeas petitioner alleged the state trial court should have allowed him to

revoke his waiver of trial counsel and should have appointed counsel when he requested representation for sentencing. *Id.* at 1056. Recognizing the Supreme Court's rule that the right to counsel can be waived, we held:

> Because the right to counsel is so central to our concepts of fair adjudication, we are reluctant to deny the practical fulfillment of the right—even once waived—absent a compelling reason that will survive constitutional scrutiny.... Therefore, although we recognize the right to counsel—once waived—is no longer absolute, we start with the strong presumption that a defendant's *post-trial* request for the assistance of an attorney should not be refused.

Id. at 1058 (quoting *Menefield*, 881 F.2d at 700) (emphasis added). We then emphasized that trial courts have discretion to deny requests for the appointment of counsel in some instances, "such as when requests are made on the eve of trial for purposes of delay." *Id.* (citing *Menefield*, 881 F.2d at 700). But, there is a "substantial practical distinction between delay on the eve of trial and delay at the time of a post-trial hearing." *Id.* Indeed, "post-verdict continuances [are] far less likely to 'substantially interfere with the court's or the parties' schedules.' " *Id.* (quoting *Menefield*, 881 F.2d at 700–01). Therefore, absent extraordinary circumstances, "a defendant's post-trial revocation of his waiver should be allowed unless the government can show that the request is made 'for a bad faith purpose.' " *Id.* (citing *Menefield*, 881 F.2d at 701). As explained in *Ignacio*, the conclusion that a defendant retains his right to re-assert the right to counsel post-trial is " 'foreordained by the Sixth Amendment and Supreme

Court precedent.' " *Id.* at 1058 n. 7 (citing *Bell*, 190 F.3d at 1092–93).

Numerous other federal circuit courts have also held that a trial court must give due consideration to a request for counsel at a post-trial proceeding, despite a previous waiver of trial counsel. *See, e.g., United States v. Taylor*, 933 F.2d 307, 311 (5th Cir.1991) (holding trial court violated the Sixth Amendment by refusing to appoint counsel to represent defendant at sentencing); *United States v. Fazzini*, 871 F.2d 635, 643 (7th Cir.1989) (holding defendant's express revocation of an earlier waiver of counsel at sentencing requires "at least an inquiry by the district judge into the defendant's representional desires"); *United States v. Holmen*, 586 F.2d 322, 324 (4th Cir.1978) (holding it was error to not have appointed counsel at the sentencing stage following the withdrawal of waiver of trial counsel); *Davis v. United States*, 226 F.2d 834, 840 (8th Cir.1955) (holding that a request for counsel prior to sentencing after a waiver of trial counsel requires the court to inquire whether the waiver has been revoked).

Five federal circuits have interpreted the Supreme Court's Sixth Amendment jurisprudence "to mean that the right to counsel is so integral to the fair administration of our justice system that a defendant who has waived his right to counsel may nonetheless re-assert" it; no circuit court has ruled to the contrary. *Ignacio*, 360 F.3d at 1059. Given these convergent holdings, as well as the general principles underlying the Supreme Court's Sixth Amendment jurisprudence, it is "clearly established federal law" that a defendant's reassertion of the right to counsel at a post-trial proceeding cannot be denied simply "on the grounds that the defendant has previously waived" it. *Ignacio*, 360 F.3d at 1059.

Although we recognize *Robinson v. Ignacio* as binding on this Court, we must address a recent case that, at first glance, calls *Ignacio's* holding into question. In *John–Charles v. California*, this Court applied a narrower interpretation of the "clearly established" requirement and addressed the appeal of a habeas petitioner who requested the appointment of counsel during trial after initially waiving his right to trial counsel. 646 F.3d at 1250–51. As in *Ignacio*, we observed that the Supreme Court in *Faretta* left open the question of "whether and under what conditions a defendant who validly waives his right to counsel has a Sixth Amendment right to reassert it later in the *same stage* of his criminal trial." *Id.* at 1249 (emphasis added). Specifically, we held:

> In short, the Supreme Court has not clearly articulated a constitutional right to *post-Faretta* reappointment of counsel *during trial*. It has not defined the standard of review that should apply to trial courts' handling of such issues. And it has not spoken on whether a trial court's error in ruling on a reappointment request is structural or trial error. This silence compels us to defer to the state court's reasonable attempts to fill the void.

Id. at 1251 (emphasis added). Rather than overruling *Ignacio*, we carefully distinguished it, repeatedly emphasizing that the claim in *John–Charles* involved the re-assertion of the right to counsel during trial—not during a separate, post-trial proceeding. *Id.* at 1252. In fact, we confirmed that *Ignacio* "did not purport to address the question of whether a self-represented defendant has a right to reappointment of counsel *once trial proceedings have begun, rather than during a subsequent proceeding.*" *Id.* (emphasis added).

The narrower interpretation of Section 2254's "clearly established" requirement in *John-Charles* stemmed from two Supreme Court decisions indicating that its precedent must be "closely on point" or give a "clear answer to the question presented" to qualify as "clearly established federal law." *Id.* at 1248 (citing *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) and *Carey v. Musladin*, 549 U.S. 70 (2006)). However, unlike this case, those two cases involved novel situations in which the Supreme Court was silent. See Wright, 552 U.S. at 125 (finding it was not clearly established law that "counsel's participation by speaker phone [in a plea hearing] should be treated as a 'complete denial of counsel.' "); *Carey*, 549 U.S. at 77 (holding there was no clearly established law regarding the prejudicial effect of spectators' courtroom conduct on fair trial rights). Because this intervening Supreme Court authority defining the scope of AEDPA review is not "clearly irreconcilable" with our decision in Robinson, we are not free to "reject the prior opinion of this court as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.2003) (en banc).

[8] *Ignacio* therefore compels our conclusion that it violates clearly established federal law to deny counsel in a posttrial, pre-appeal proceeding simply because the defendant has previously exercised his right to represent himself. We are not persuaded that Rodgers' claim differs from that of the petitioner in *Ignacio* merely because it deals with a new trial motion rather than sentencing. In all material aspects, Rodgers' claim is indistinguishable from that in *Ignacio*, in which we focused not on attributes inherent in sentencing proceedings, but rather on the basic characteristics present in all posttrial proceedings. In fact, a motion for new trial and sentencing are the main elements of a post-trial

proceeding. For this very reason, we previously recognized:

> It is not surprising that a criminal defendant, having decided to represent himself and then having suffered a defeat at trial, would realize that he would be better served during *the remainder of the case* by the assistance of counsel. A criminal defendant may initially assert his right to self-representation for reasons that later prove unsound. The accused may doubt the willingness of an appointed attorney to represent his interests. More often, the accused may have a baseless faith in his ability to mount an effective defense. The lure of self-representation may, however, exact a significant price; lost at trial, the defendant may miss important opportunities and even create gaping holes in his own case. The accused has little recourse against the failings caused by his own inartfulness.

Menefield, 881 F.2d at 700 (emphasis added). Indeed, forcing criminal defendants to stumble through post-trial proceedings—sentencings or otherwise—"serves neither the individual nor our system of adversarial justice well." *Id.*

The California State Court's Decision

Having identified the "clearly established federal law" that governs Rodgers' Sixth Amendment claim, we review the state court's decision to determine whether it was contrary to, or involved an unreasonable application of, that law.

Rodgers informed the trial court he wished to file a motion for new trial immediately following the guilty verdict. At that time, Rodgers requested the

reappointment of counsel, but the trial court denied Rodgers' request, holding:

> We aren't doing anything like that right now, Mr. Rodgers. If you have some request that you want to make a motion for something, I expect that you will do that and you will serve it, and you will file it, we will take it up at that time.

A month later, Rodgers again requested counsel for perfecting a new trial motion, this time in a written motion. The trial court once more denied Rodgers' request, and the following exchange occurred:

> RODGERS: Your Honor, also, if you are going to deny counsel—
>
> COURT: You are not going to get counsel, Mr. Rodgers. You made this election to represent yourself. Everybody tried to talk you out of it at the time. You insisted you wanted to do it. You are doing it. We aren't going to substitute in an attorney at this time.

In addressing the trial judge's denial of Rodgers' request for counsel, the California appellate court reasoned:

> When, as here, a defendant has exercised his right to represent himself at trial and later seeks to have counsel appointed, the court's decision to deny counsel is reviewed for an abuse of discretion. In determining whether the court abused its discretion, we consider the "totality of the facts and circumstances."

(internal citations omitted). The court then focused on the fact Rodgers switched between representation and self-representation at various times throughout

the case, and noted Rodgers' motion did not include facts or reasons in support. The court also held Rodgers "exhibited considerable knowledge of both trial tactics and trial procedure," and ultimately concluded the trial judge did not abuse his discretion in declining to appoint counsel for a new trial motion.

[9] The California appellate court's decision is indistinguishable from the state court decision we held to be contrary to clearly established federal law in *Ignacio*. There, as here, the state court incorrectly applied an abuse of discretion standard in determining the trial court did not violate the petitioner's Sixth Amendment rights. As we explained in *Ignacio*, and as holds equally true here, this standard permitted the state court to affirm the denial of the defendant's timely request for representation without any basis other than "the discredited idea that once waived, the right to counsel cannot be reasserted at sentencing." *Ignacio*, 360 F.3d at 1061. It is "clearly established federal law" that the post-trial motion for new trial is a "critical stage" that implicates the right to counsel, as is a defendant's right to re-assert the right to counsel during post-trial proceedings. For that reason, trial courts cannot deny a defendant's timely request for representation without a sufficient reason. Here, the state trial court had no such reason, and to the extent the California appellate court found such reason, its "decision was based on an unreasonable determination of the facts." *See* 28 U.S.C. § 2254(d)(2).

While Rodgers did not give any reasons for his request for counsel, it is clear the trial judge rejected his request "based primarily on the discredited idea that once waived, the right to counsel cannot be re-asserted...." *Ignacio*, 360 F.3d at 1061. Regardless, denying Rogers' request because he failed to

articulate a reason is tantamount to denying his request because of his prior *Faretta* waiver. Indeed, the obvious reason Rodgers wanted counsel—even if he did not explicitly state it—was his belief that trained counsel would be better able to prepare his new trial motion.

[10] Because the trial court's focus on Rodgers' waiver of counsel at trial was inappropriate, we conclude its denial of Rodgers' request violated his Sixth Amendment right to counsel. Therefore, the California appellate court's decision, which upheld the trial judge's denial of Rodgers' request, was "contrary to ... clearly established federal law."

Uncertified Issues

We deny Rodgers' motion to expand the Certificate of Appealability pursuant to Ninth Circuit Rule 22–1 and decline to address the uncertified issues raised in his brief, as Rodgers has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Cooper–Smith v. Palmateer*, 397 F.3d 1236, 1245 (9th Cir.2005).

CONCLUSION

We acknowledge the difficulties that faced the trial judge in dealing with a defendant who alternated back and forth between asking for counsel during pretrial proceedings and then chose to go it alone at trial. However, those difficulties—while frustrating—must give way to constitutional concerns and a defendant's right to counsel at all "critical stages" of his criminal prosecution.

Accordingly, we hold Rodgers' Sixth Amendment right to counsel was violated when the trial court denied his timely request for representation for a new trial motion based on the notion that once waived, the right to counsel cannot

be reasserted. This holding is consistent with our previous rulings, as well as those of numerous federal circuit courts applying clearly established Supreme Court precedent. Furthermore, due to the fundamental importance of the right to counsel, Rodgers need not prove prejudice and a harmless error analysis is not required. *See Ignacio*, 360 F.3d at 1061 (citing *Cronic*, 466 U.S. at 659).

The Supreme Court has instructed that courts have "broad discretion in conditioning a judgment granting habeas relief. Federal courts are authorized, under 28 U.S.C. § 2243, to dispose of habeas corpus matters 'as law and justice require.' " *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Regarding the right to counsel, we previously held that a habeas remedy "should put the defendant back in the position he would have been in if the Sixth Amendment violation never occurred." *Nunes v. Mueller*, 350 F.3d 1045, 1057 (9th Cir.2003). Moreover, the Supreme Court "has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton*, 481 U.S. at 775.

[11] Therefore, in this case, a remand to the California trial court is appropriate. The district court is directed to remand this matter to the state trial court for Rodgers to receive effective assistance of counsel for consideration of filing a new trial motion.

REVERSED and **REMANDED**.

APPENDIX B

FILED May 4, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA

EDCV 08-1003-VAP (MLG)

OTIS LEE RODGERS,
Petitioner,
v.
JOHN MARSHALL, Warden,
Respondent.

ORDER ACCEPTING AND ADOPTING
FINDINGS AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the petition and all of the records and files and has conducted a de novo review of that portion of the Report and Recommendation of the United States Magistrate Judge to which objections were filed. The Court accepts and adopts the findings and recommendations in the Report and Recommendation and orders that judgment be entered denying the petition with prejudice.

Dated: May 4, 2010

_____
Virginia A. Phillips
United States District Judge

APPENDIX C

FILED May 4, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA

EDCV 08-1003-VAP (MLG)

OTIS LEE RODGERS,
Petitioner,
v.
JOHN MARSHALL, Warden,
Respondent.

ORDER GRANTING IN PART AND DENYING IN PART CERTIFICATE OF APPEALABILITY

Effective December 1, 2009, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts was amended to require the district court to issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the petitioner.

Before a petitioner may appeal the Court's decision denying his petition, a COA must issue. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). The Court must either issue a COA indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. p. 22(b).

The court determines whether to issue or deny a COA pursuant to standards established in *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000); and 28 U.S.C. § 2253(c). A COA may be issued only where there has been a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2); *Miller-El*, 537 U.S. at

330. As part of that analysis, the Court must determine whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484, *See also Miller-El*, 537 U.S. at 338.

In *Silva v. Woodford*, 279 F.3d 825, 832-33 (9th Cir. 2002), the court noted that this amounts to a "modest standard". (Quoting *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000)). Indeed, the standard for granting a COA has been characterized as "relatively low". *Beardlee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004). A COA should issue when the claims presented are "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 483-84, (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)); *see also Silva*, 279 F.3d at 833. If reasonable jurists could "debate" whether the petition could be resolved in a different manner, then the COA should issue. *Miller-El*, 537 U.S. at 330.

Under this standard of review, a certificate of appealability should be DENIED in part and GRANTED in part. In denying the petition for writ of habeas corpus, the Court rejected all of Petitioner's claims. For the reasons stated in the Magistrate Judge's Report and Recommendation, Petitioner cannot make a colorable claim that jurists of reason would find debatable or wrong this Court's decision with respect to claims 1-6 or 8-21. Thus, Petitioner is not entitled to a certificate of appealability on these grounds for relief.

On the other hand, a certificate of appealability should be granted as to Petitioner's claim 7: that the trial court violated the Sixth Amendment by denying Petitioner's request for the appointment of counsel to file a motion for new trial. Although this Court denied this ground for relief on the merits, Petitioner has made a colorable claim that jurists of reason

could find debatable or wrong this Court's findings on this issues. Thus, petitioner is entitled to a certificate of appealability on the denial of counsel claim.

Therefore, pursuant to 28 U.S.C. § 2253, the Court GRANTS the request for a certificate of appealability on the claim described above.

Dated May 4, 2010

_____

Virginia A. Phillips
United States Magistrate Judge

APPENDIX D

FILED March 19, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA

EDCV 08-1003-VAP (MLG)

OTIS LEE RODGERS,
Petitioner,
v.
JOHN MARSHALL, Warden,
Respondent.

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

On June 27, 2003, a Riverside County Superior Court jury found Petitioner Otis Lee Rodgers guilty of assault with a firearm (Cal. Penal Code § 245(a)(2)), possession of a firearm by a felon (Cal. Penal Code § 12021(a)(1)), possession of ammunition by a felon (Cal. Penal Code § 245(a)(2)), and making criminal threats (Cal. Penal Code § 422). (Lodgment 1, Clerk's Transcript ("CT") at 491-94). The jury also found true the sentencing enhancement allegations that 1) Petitioner personally used a firearm (Cal. Penal Code §§ 12022.5(a)(1), 1192.7(c)(8)) while committing the assault and making the criminal threats, and 2) that Petitioner was on bail pending trial for another felony offense when he committed the crime of being a felon in possession of ammunition (Cal. Penal Code § 12022.1). (CT at 495-97). Petitioner admitted that he had suffered two prior felony convictions, that he had been sentenced to prison on each of them, and that within five years of release from custody committed another felony

offense (Cal. Penal Code § 667.5(b)). (CT at 84, 406; Lodgment 2, Reporter's Transcript,[FN1] RT at 87-88, 244-45). Petitioner was sentenced to 16 years in prison. (CT at 526-28).

> FN1. Respondent lodged five non-sequential volumes of the Reporter's Transcript. (Lodgment 2). Volumes 1, 2, and 3 of the Reporter's Transcript will be referred to as ("RT 1"), ("RT 2"), and ("RT 3"), respectively. Volumes 4 and 5 will be referred to as ("RT").

I. Facts[FN2]

Early in the morning on July 15, 2001, Sandra Rodriguez was awakened by screaming and yelling from the parking lot of a nearby apartment complex, the Garden Estate Apartments. (RT at 125-26). Rodriguez looked through her window and saw an African American man and woman by a red car in the parking lot. (RT at 126-27). The man was calling the woman a prostitute and threatening to kill her. (RT at 131). The man hit the woman in the head with his fist and told her to "[g]ive me the fucking gun." (RT at 131-32). The woman retrieved a gun from the car and gave it to the man. (RT at 132). The man then put the gun to the woman's head and said he was going to kill her. (RT at 132-33). The woman was crying. (RT at 131).

> FN2. The facts are taken from the unpublished portion of the California Court of Appeal's opinion in *People v. Rodgers*, 33 Cal. App. 4th 1560 (2005), Case No. E034205 and the Reporter's Transcript.

Rodriguez's 11-year old daughter, Nelida Sanchez, also heard the man threaten to kill the

woman and saw the man pointing a gun at the woman's head. (RT at 193-94).

Rodriguez made an anonymous 911 call. (RT at 147, 307). While Rodriguez was talking to the 911 dispatcher, she saw a patrol car pass by the parking lot. (RT at 147-48). Rodriguez informed the dispatcher that the patrol car needed to turn around. (RT at 148, 306). Riverside County Sheriff Deputy Gary Bowen was driving the patrol car. He had received a radio dispatch that a man and woman were in a red sedan in the apartment complex parking lot and the man had said he was going to shoot and kill the woman. (RT at 204). As Deputy Bowen entered the parking lot, Petitioner was driving out of the parking lot in a red sedan. (RT at 204). Petitioner's wife, Joyce Rodgers, was in the passenger seat. (RT at 205, 210-11). Joyce was upset and crying. (RT at 205). Petitioner told Deputy Bowen that they had been having an argument over financial problems. (RT at 205). After discovering that Petitioner did not possess a valid driver's license, Deputy Bowen put Petitioner in the back of the patrol car. (RT at 214, 22). Joyce told Deputy Bowen that Petitioner had not threatened or assaulted her. (RT at 211). Riverside County Sheriff Deputy Nathan Padilla arrived at the scene as backup. (RT at 229). Deputy Padilla observed several fresh gouge wounds on both of Joyce's shoulders, which appeared to have been caused by someone's fingernails. (RT at 230-31). Joyce told Deputy Padilla that she and Petitioner had been arguing and that she had scraped her shoulders on a nail that was sticking out of a wall. (RT at 230, 232). With Joyce's consent, Deputy Bowen searched Petitioner's car. (RT at 223). Inside the trunk Deputy Bowen found a .357 magnum revolver and ammunition. (RT at 207-08).

Petitioner represented himself at trial. In addition to calling several witnesses, Petitioner testified in his own behalf. (RT at 270-83). Petitioner testified that on the night of the incident, he and Joyce went to a club and then drove to a parking lot near a friend's home. (RT at 273). Other cars, including a red car, were also in the parking lot, along with other African American males and females. (RT at 273-74). Petitioner and Joyce waited in their car for their friend to return from the club. (RT at 274). About 30 to 45 minutes later, Petitioner noticed police cars "zooming around." (RT at 275). As Petitioner was leaving the parking lot, Deputy Bowen pulled up. (RT at 275, 277). After asking Petitioner some questions about his driver's license, Deputy Bowen placed Petitioner in the back of the patrol car. (RT at 278-79). Deputy Bowen then took a plastic bag containing a dark object out of the patrol car, went to Petitioner's car, opened the trunk and then returned with the bag that had previously been in the patrol car. (RT at 279).

II. Procedural History

Petitioner appealed the judgment to the California Court of Appeal. (Lodgment 3). On August 18, 2005, the California Court of Appeal affirmed Petitioner's convictions and sentence. (Lodgment 6). Petitioner filed a petition for review with the California Supreme Court.[FN3] (Lodgment 7). The petition was dismissed on July 11, 2007. (Lodgment 26).

> FN3. On November 30, 2005, the California Supreme Court granted review pending its decision in a companion case, (*People v. Dolly*, Cal. Sup. Ct. No. S134505), concerning the legality of the traffic stop. (Lodgment 9). Ultimately, the

> California Supreme Court issued its decision in *Dolly*, which was unfavorable to Petitioner.

Meanwhile, while the petition for review was pending in the California Supreme Court, Petitioner filed petitions for writs of habeas corpus with the California Court of Appeal and the California Supreme Court challenging the search of his vehicle. (Lodgments 9, 11 (citing Georgia v. Randolph, 547 U.S. 103 (2006)). These petitions were denied. (Lodgments 10, 15).

Although Petitioner was represented by appellate counsel, Petitioner also filed numerous pro per motions, post-conviction pleadings and writ applications in the California Court of Appeal and the California Supreme Court, including several motions for substitution of appellate counsel. (See Lodgments 25, 29, 36, 31, 33, 38); Supp. Lodgments 2, 3, 4, 5). These claims were rejected by the appellate courts. (Lodgments 27, 30, 32, 35, 36, 39; Supp. Lodgment 1, 6).

Petitioner filed a Petition for Writ of Habeas Corpus with this Court on July 24, 2008, raising the following 21 claims for relief:

> Ground 1: Petitioner was subjected to an unlawful investigative stop of his vehicle, and appellate counsel provided ineffective assistance by failing to adequately challenge the denial of his motion to suppress evidence and failing to timely raise the Fourth Amendment "consent- shopping" issue on appeal.[FN4] (Petition for Writ of Habeas Corpus, Attachment ("Petition") at 1 at 1-3).
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> FN4. This ineffective assistance of appellate counsel claim is also referred to as "Ground A." (*See* Answer at 9-11).

Ground Two: The trial court abused its discretion and denied Petitioner due process when it denied his motion for a pretrial line-up. (Petition at 4-5).
Ground Three: The trial court violated Petitioner's right to an impartial jury by restricting him from asking the jury whether his prior felony record would cause them to be biased against him. (Petition at 6-11).
Ground Four: The trial court violated Petitioner's right to due process by accepting his admissions concerning his prior convictions without advising him of the right to a jury trial on that matter. (Petition at 12).
Ground Five: There was insufficient evidence to support the "sustained fear" element of Petitioner's conviction for making criminal threats. (Petition at 13-14).
Ground Six: Petitioner was denied the right to a unanimous jury verdict because the prosecutor argued multiple factual theories on the assault with a firearm charge, and the jury was not instructed that it was required to unanimously agree on a single theory. (Petition at 15-16).
Ground Seven: Petitioner was denied the right to counsel at the motion for new trial stage and at sentencing. (Petition at 17-18).
Grounds Eight and Nine: The trial court abused its discretion, denied Petitioner due process, and violated Petitioner's Sixth Amendment right to a jury trial by sentencing Petitioner to upper term sentences on the assault with a firearm conviction and personal use of a firearm enhancement. (Petition at 19-24).
Ground Ten: Petitioner was deprived of the right to self- representation on direct appeal. (Petition at 24).
Ground Eleven: Appellate counsel provided ineffective assistance by failing to raise the claims set

forth in Grounds Twelve through Twenty-One on direct appeal. (Petition at 24).

Ground Twelve: There was insufficient evidence identifying Joyce as the victim and Petitioner as the perpetrator of the assault with a firearm. (Petition at 25-28).

Grounds Thirteen, Fourteen, and Seventeen: The prosecutor offered false evidence when Rodriguez testified that she saw a gun and identified Petitioner as the perpetrator of the assault with a firearm. (Petition at 29-35, 50-55).

Ground Fifteen: The trial court was biased against Petitioner. (Petition at 7, 36-49).

Grounds Sixteen and Nineteen: The prosecutor engaged in vindictive prosecution by filing additional charges against Petitioner after Petitioner rejected a plea bargain. (Petition at 50, 65-67).

Ground Eighteen: The prosecutor engaged in prosecutorial misconduct during closing argument. (Petition at 8, 56-64).

Ground Twenty: The trial court denied Petitioner due process and violated Petitioner's Sixth Amendment right to a jury trial by sentencing Petitioner to upper term sentences on the assault with a firearm conviction and personal use of a firearm enhancement. (Petition at 68).

Ground Twenty-One: Petitioner was prejudiced by cumulative error. (Petition at 68).

Respondent filed an Answer on April 10, 2009.[FN5] Petitioner filed a Reply on April 24, 2009. This case is now ready for decision.

FN5 Earlier, Respondent had filed a motion to dismiss the Petition based on exhaustion grounds. On February 25, 2009, this Court denied the motion and ordered Respondent to file an Answer.

III. Standard of Review

Federal habeas corpus relief is available to state prisoners who are in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides the standards for habeas corpus review. To establish a right to relief, a petitioner must show that the state's highest court rejected the petitioner's claim on the merits, and that this rejection was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d); *Nunes v. Ramirez-Palmer*, 485 F.3d 432, 437-38 (9th Cir. 2007).

Clearly established federal law arises only from Supreme Court holdings, as opposed to dicta, *Carey v. Musladin*, 549 U.S. 70, 74 (2006), although circuit law may be persuasive authority for determining the correct application of Supreme Court law, *Mendez v. Knowles*, 556 F.3d 757, 767 (9th Cir. 2008); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). A state court decision is "contrary to" clearly established federal law where the state court applies a rule contradicted by the governing federal law, or "confronts a set of facts that is materially indistinguishable from a [Supreme Court decision] but reaches a different result." *Brown v. Payton*, 544 U.S. 133, 141 (2005) (citing *Williams v. Taylor*, 529 U.S. 362, 406 (2000)). A state court decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the decisions of the Supreme Court, but unreasonably applies that

principle to the facts of the case. *Brown*, 544 U.S. at 141; *Williams v. Taylor*, 529 U.S. at 407-08, 413.

It is not enough that a federal court conclude "in its independent judgment" that the state court decision is incorrect or erroneous. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (*per curiam*)). AEDPA requires federal courts to afford substantial deference to a state court decision that reached the merits of a petitioner's claims, and the state's misapplication of clearly established law must not only be incorrect, but also objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Anderson v. Terhune*, 467 F.3d 1208, 1212 (9th Cir. 2006).

A state court's decision is an "unreasonable determination of the facts" where the record does not support a trial court's findings, and the appellate court's affirmation of those findings after confronting the defect was objectively unreasonable. *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004). State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by "clear and convincing evidence." *Rice v. Collins*, 546 U.S. 333, 338-39 (2006).

The California Supreme Court denied the claims in the Petition without issuing a reasoned decision.[FN6]

> FN6 Respondent contends that the claim raised in Ground Nineteen was not presented to the California Supreme Court. (See Answer at 51). Upon further review, this contention is arguably correct. Assuming that Ground Nineteen was not fairly presented, "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the

> applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). It is appropriate to deny an unexhausted claim on the merits under section 2254(b)(2) when it is "perfectly clear that the applicant does not raise even a colorable federal claim." *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005); *cf. Rhines v. Webber*, 544 U.S. 269, 277 (2005) (discussing application of 28 U.S.C. § 2254(b)(2)). Because it is clear that the claim raised in Ground Nineteen meets this standard, the Court will exercise its discretion to address and reject the claim on the merits.

(*See* Lodgments 7, 15, 27, 32, 35, 39). When a state supreme court summarily denies a claim without explanation, federal courts must "look through" the unexplained decision and apply the AEDPA analysis to the last reasoned decision by a lower court. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-806 (1991); *Delgadillo v. Woodford*, 527 F.3d 919, 925 (9th Cir. 2008) (citations omitted). Here, the California Court of Appeal rejected the claims raised in Grounds One through Nine in a written decision on direct review. (Lodgment 6). In the course of denying the Petitioner's pro per motions for the substitution of appellate counsel, the California Court of Appeal adjudicated the merits of the claims raised in Grounds Ten through Eighteen, Twenty and Twenty-One in a reasoned decision.[FN7] (Supp. Lodgment 6). Thus, this Court will consider the decisions of the California Court of Appeal to determine whether the California Supreme Court's decision denying Petitioner's claims was contrary to, or an unreasonable application of, clearly established federal law.

FN7 *See* note 13, *infra*.

IV. Discussion

A. Ground One: Legality of the Search and Seizure/Ineffective Assistance of Appellate Counsel

Petitioner asserts that the gun and ammunition seized from his vehicle should have been suppressed because they were obtained during an illegal search in violation of the Fourth Amendment. (Petition at 1-3; Reply at 1-3). In particular, Petitioner claims that the police lacked probable cause to detain him and search his vehicle because Petitioner was not engaged in any criminal behavior and the police were acting in response to an anonymous tip. (Petition at 1-3 (citing *Florida v. J.L.*, 529 U.S. 266, 272-74 (2000) (holding that an anonymous phoned-in tip claiming a young African-American man in a plaid shirt standing at a particular bus stop was carrying a gun was insufficient to justify a brief detention and patdown search, absent some independent corroboration of the reliability of the tip and tipster's assertion of illegal conduct)).

Prior to trial, Petitioner moved to suppress the evidence by arguing that the police lacked proper authorization and reasonable cause to conduct the search of his vehicle. (CT at 13-17, 144, 161); Cal. Penal Code § 1538.5. An evidentiary hearing was held before a state court commissioner. (RT 1 at 1-63). At the hearing, Deputy Bowen, Petitioner, and Joyce Rodgers testified. (RT 1 at 8-27, 29-43, 44-57). The commissioner denied the motion, finding that the search was proper because Joyce had given her consent and the deputies had independent probable cause to search for a weapon. (RT 1 at 61-63; RT at 22-25). Later, the trial court reviewed Petitioner's motion to suppress. (CT 144, 161; RT at 22-29). It agreed with the commissioner's ruling, concluding that the deputies had probable

cause to conduct a search of Petitioner's vehicle. (RT at 33-34).

Petitioner reasserted his challenge to the search in the state appellate courts in his petitions for direct review and petitions for habeas corpus relief. (Lodgments 3, 7, 11). The state courts considered and rejected his claim. (Lodgments 6 at 3-16, 15, 26).

Petitioner was able to litigate his Fourth Amendment claim at multiple levels in the California courts. Therefore, he is precluded from obtaining relief on this claim on federal habeas review. *Stone v. Powell*, 428 U.S. 465, 494 (1976) (holding that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial); *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996) (a federal habeas corpus court need not address a Fourth Amendment question as long as the state court has given the petitioner a full and fair opportunity to litigate the claim in state court). Although Petitioner disagrees with the state courts's factual and legal conclusions regarding his claim, his dissatisfaction with the state courts's rulings does not undermine the finding that he was given a full and fair opportunity to litigate his claim.

Petitioner also argues that appellate counsel was ineffective in failing to adequately challenge the validity of the search on appeal and by failing to timely raise the argument that Deputy Bowen engaged in improper "consent shopping" when he requested and obtained Joyce's consent to conduct the search after Petitioner refused to give his permission. (Petition at 1-2).

To establish ineffective assistance of appellate counsel, a petitioner must show that appellate counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, he would have prevailed on appeal. *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see also Morrison v. Estelle*, 981 F.2d 425, 427 (9th Cir. 1992) (finding the standard for assessing the performance of trial and appellate counsel is essentially the same under *Strickland*).

Petitioner's ineffective assistance claim is not supported by the record. Appellate counsel argued, on both direct and collateral review, that the search of Petitioner's vehicle was improper. (*See* Lodgments 3 at 15-21, 7 at 7-12, 11, 14). The consent shopping argument was raised just two months after the Supreme Court issued its decision in *Georgia v. Randolph*, 547 U.S. 103, 120 (2006), which held that consent of one tenant cannot override the express refusal of a co-tenant to conduct a warrantless search of a shared dwelling house. Thus, appellate counsel's performance was objectively reasonable. Moreover, Petitioner has not shown a reasonable probability that he would have prevailed on appeal had appellate counsel asserted the consent shopping argument earlier in the proceedings or raised additional challenges to the search on appeal. *Miller*, 882 F.2d at 1434. Accordingly, Petitioner is not entitled to relief on this claim.

B. Ground Two: Denial of Petitioner's Motion For A Live Lineup

Petitioner asserts that the trial court erred when it denied his motion for a live lineup. (Petition at 4-5). This claim is also without merit.

In October 2001, a few months after the incident, Rodriguez was interviewed by the prosecutor and a defense investigator. (RT at 253). Rodriguez explained that while she had observed an African American man threatening to kill a woman, she did not see the man's face well enough to be able to identify him again and could not identify his gun. (RT at 247, 252). Rodriguez had been about 100 feet away from the man. (RT at 247). Prior to trial, Petitioner filed a motion to conduct a live lineup. (CT at 113-19). Petitioner sought to establish Rodriguez's inability to identify him as the man who assaulted the woman in the parking lot. (CT at 113-19). The trial court denied the motion. (CT at 204; RT at 14). Petitioner claims that the trial court's ruling violated his right to due process.[FN8] (Petition at 4-5).

> FN8 Petitioner further argues that the trial court abused its discretion when it denied his motion for a live lineup. (Petition at 4). However, federal habeas relief is available only when there has been a violation of the federal constitution, laws or treaties. See 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (mere errors in the application of state law do not warrant the issuance of the federal writ); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("federal habeas corpus relief does not lie for errors of state law").

The California Court of Appeal rejected Petitioner's claim. (Lodgment 6 at 20-21). It found that a lineup would have been

unnecessary, as Rodriguez's ability to identify Petitioner was not a material issue. (Lodgment 6 at 21). The Court further explained that Rodriguez's role in the identification of Petitioner "was limited to testifying that she saw the deputies make contact with the person that had threatened the woman." (Lodgment 6 at 21). Deputy Bowen established Petitioner's identity when he testified that the person he made contact with in the parking lot was Petitioner. (Lodgment 6 at 21).

Under California law, "due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate." *Evans v. Superior Court*, 11 Cal.3d 617, 625 (1974). But unlike *Evans*, the United States Supreme Court has never held that a criminal defendant has a constitutional right to a pretrial lineup. *See United States v. Robertson*, 606 F.2d 853, 857-58 (9th Cir. 1979) ("An accused has no absolute or constitutional right to a lineup."); *see also Sims v. Sullivan*, 867 F.2d 142, 145 (2d Cir. 1989). Accordingly, the state court's rejection of this claim was neither contrary to nor an unreasonable application of clearly established federal law.

C. Ground Three: Admonishment During Voir Dire

In Ground Three, Petitioner contends the trial court violated his right to an impartial jury by improperly restricting his ability to question the jury venire about their potential biases against him, particularly with respect to his prior felony convictions. (Petition at 6).

The California Court of Appeal found that Petitioner forfeited his claim of jury impartiality, as he failed to adequately object to at trial. (Lodgment 6

at 22-23). Petitioner did not "ask to be heard, rephrase his question, or otherwise attempt to make a record concerning the scope of his question." (Lodgment 6 at 23). Therefore, it was "impossible" to determine whether Petitioner's voir dire questions concerning his prior convictions would have been objectionable. (Lodgment 6 at 23).

"Under the doctrine of procedural default, a petitioner who has defaulted on his claims in state court is barred from raising them in federal court so long as the default is 'pursuant to an independent and adequate state procedural rule.'" *Jackson v. Roe*, 425 F.3d 654, 656 n.2 (9th Cir. 2005) (quoting *Coleman v. Thompson*, 501 U.S. 722 (1991)). The Ninth Circuit has determined that California's contemporaneous objection rule is an independent and adequate procedural bar. *See Davis v. Woodford*, 384 F.3d 628, 654 (9th Cir.2004) (finding petitioner's Confrontation Clause claim was procedurally barred for failure to raise a constitutional objection at trial); *Vansickel v. White*, 166 F.3d 953, 957-59 (9th Cir. 1999) (recognizing and applying California's contemporaneous objection rule in affirming denial of federal petition on procedural default grounds); *Rich v. Calderon*, 187 F.3d 1064, 1069-70 (9th Cir. 1999) (declining to review various prosecutorial misconduct claims as procedurally barred due to petitioner's failure to make contemporaneous objections); *Bonin v. Calderon*, 59 F.3d 815, 842-43 (9th Cir. 1995) (sustaining state court's finding of procedural default where defendant failed to make any objection at trial). Moreover, the rule has been consistently applied in the California courts. *See Melendez v. Pliler*, 288 F.3d 1120, 1125 (9th Cir. 2002) (citing *Garrison v. McCarthy*, 653 F.2d 374, 377 (9th Cir. 1981). Here, because Petitioner

failed to object to the trial court's admonishment, his claim is procedurally defaulted.

Petitioner further claims that the trial court erred by failing to *sua sponte* inquire whether the jury venire would be biased against him based on his race, jail clothing, and African-style braids. (Petition at 6-11). Petitioner has not presented, and this Court is not aware of, any decision of the United States Supreme Court interpreting the federal constitution to require that a trial court question a juror *sua sponte* about such topics. *See Sims v. Rowland*, 414 F.3d 1148, 1153 (9th Cir. 2005) (holding that failure of state court to hold evidentiary hearing *sua sponte* to investigate potential juror bias was not contrary to clearly established federal law where "the Supreme Court has not yet decided whether due process requires a trial court to hold a hearing" in such circumstances). This claim does not warrant federal habeas relief.

D. Ground Four: Right To Jury Trial On Prior Felony Conviction Allegations

To prevent the jury from hearing the nature of his prior felony convictions, Petitioner stipulated to the fact that he had been previously convicted of two felonies. (RT at 87-88). In so doing, Petitioner also admitted that he served two prior prison terms and failed to remain free from custody for five years within the meaning of California Penal Code § 667.5(b). (RT at 87-88). Petitioner claims that the trial court erred in failing to admonish him of his constitutional right to a jury trial, right to confront and cross-examine witnesses, and right against self-incrimination prior to accepting his stipulation. (Petition at 12).

This claim was brought by Petitioner on direct review. The California Court of Appeal

found that the trial court did not properly advise Petitioner of his rights or obtain a valid waiver of those rights prior to accepting his admissions to the section 667.5(b) enhancements. (Lodgment 6 at 26 (citing *Boykin v. Alabama*, 395 U.S. 238 (1969); *In re Tahl*, 1 Cal.3d 122 (1969)). Nonetheless, it concluded that based on the totality of the record, it was apparent that Petitioner was well aware of his right to a jury trial, right to be represented by counsel, right to confront witnesses, right to testify, and right against self-incrimination. (Lodgment 6 at 27). Therefore, it concluded that Petitioner knowingly, intelligently and voluntarily admitted the facts underlying the section 667.5(b) enhancements. (Lodgment 6 at 27). The state court's decision was not contrary to, or an unreasonable application of controlling federal law.

Due process requires that a guilty plea entered by a defendant be both knowing and voluntary because it constitutes the waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *See Boykin*, 395 U.S. at 242-43. A conviction based on stipulated facts, on the other hand, only requires that the defendant knowingly and voluntarily agree to the stipulation, not a knowing and voluntary waiver of constitutional rights as required by *Boykin*. *Adams v. Peterson*, 968 F.2d 835, 843 (9th Cir. 1992) (*en banc*) (defendant's convictions based on stipulated facts were valid only if he voluntarily and knowingly agreed to stipulation).

Here, the record establishes that Petitioner's stipulation to the prior conviction allegations was voluntary. Prior to trial, Petitioner filed a motion in limine stating that he intended to stipulate to

his prior convictions as his convictions would "unnecessarily inflame and prejudice the jury" against him. (Lodgment 6 at 25). The record also supports the state court's conclusion that Petitioner's stipulation was knowingly made.[FN9]

> FN9. The transcript of Petitioner's agreement to the stipulation provides as follows:
>
> Court: On Count II, it's alleged that you suffered a prior felony conviction for Penal Code Section 12001.6 in the Superior Court in the state of Ohio, the County of Cuyahoga.
>
> Petitioner: That's correct.
>
> Court: You are admitting that that (sic) section -- that that (sic) allegation is true?
>
> Petitioner: Yes, Your Honor.
>
> Court: Okay. And Count III, let's see, is this the same one?
>
> Prosecutor: Yeah. Yes.
>
> Court: Same one. Okay.
>
> So you also admit it's true as to Count III; is that correct, Mr. Rodgers?
>
> Petitioner: Count III is the prohibiting a person --
>
> Court: That's the ammunition.
>
> Petitioner: Ammunition. Yes, Your Honor.
>
> Court: Okay. Then we have the prior offenses. One of them is alleged that on June 9th of 1983, and again Ohio, and Cuyahoga County, you were convicted of the crime of kidnapping and you served a term in state prison and did not remain free of custody for five years thereafter, within the meaning of Penal Code section 667.5. That's your first prior, is that true?

> Petitioner: That's correct, Your Honor.
>
> Court: The second one is January 4th -- January 9th, 1984, in Superior Court. . . , State of Arizona, County of Maricopa. You were convicted of receiving the earnings of a prostitute, a felony, served a term in state prison, didn't remain free of custody for five years thereafter, again within the meaning of Penal Code Section 667.5, is that also true, Mr. Rodgers?
>
> Petitioner: That's correct, Your Honor.

(RT at 87-88).

When questioned about his prior offenses, Petitioner admitted on the record that he had prior convictions for kidnapping and receiving the earnings of a prostitute. (RT at 87-88). Petitioner further admitted that he served prison terms for both prior convictions and did not remain free of custody for five years thereafter, within the meaning of Penal Code section 667.5. (RT at 88). There was nothing in to record to indicate that Petitioner acted unknowingly, was unaware of his rights, or otherwise not aware of what he was doing when he made these admissions. Thus, Petitioner has failed to overcome the presumption of correctness accorded to the state court's finding that Petitioner understood the rights that he was waiving when he entered the stipulation. (Lodgment 6 at 27). Accordingly, Petitioner is not entitled to habeas corpus relief on this claim.

E. Ground Five: Sufficiency of the Evidence

Petitioner challenges his conviction for making criminal threats, claiming there was insufficient evidence that Joyce was in sustained fear

for her safety. (Petition at 13-14); Cal. Penal Code § 422.

The Due Process Clause of the Fourteenth Amendment protects a criminal defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *accord Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). However, a federal habeas petitioner "faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." *Juan H.*, 408 F.3d at 1274. The evidence must be viewed in the light most favorable to the prosecution and the petitioner is not entitled to relief if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (italics in original); *accord Juan H.*, 408 F.3d at 1274.

The *Jackson* standard is applied with specific reference to the applicable state law defining the elements of the crime at issue. *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004). The sustained fear element of making criminal threats has a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances. *People v. Toledo*, 26 Cal. 4th 221, 228 (2001); *In re Ricky T.*, 87 Cal. App. 4th 1132, 1140 (2001).

In analyzing Petitioner's insufficiency claim, the California Court of Appeal reviewed the evidence in the light most favorable to the judgment. (Lodgment 6 at 28 (citing *In re Ryan*, 100 Cal. App. 4th 854, 859 (2002) (citation omitted)). It concluded that a reasonable trier of fact could find that Petitioner's threat caused Joyce to be in sustained fear.

(Lodgment 6 at 29). The state court's rejection of this claim was not objectively unreasonable. 28 U.S.C. § 2254(d); *Juan H.*, 408 F.3d at 1275, n.13.

At trial, Rodriguez testified that she heard people arguing in the apartment complex. (RT at 126). From her window, Rodriguez observed Petitioner call Joyce a prostitute and threaten to kill her.[FN10]

> FN10 Although initially Rodriguez was not able to identify Petitioner, and she never identified Joyce, she testified that the man and woman to whom she was referring were stopped by a police officer in the parking lot. (RT at 136-37). Deputy Bowen confirmed that Petitioner and Joyce were the couple that he stopped. (RT at 204-05, 210).

(RT at 127). Joyce was crying. (RT at 131). Petitioner hit Joyce with his fist and demanded that she give him a gun. (RT at 131). Once Petitioner had the gun, he put it up to Joyce's head and said, "I am going to kill you, fucking bitch." (RT at 133-34). Joyce was crying throughout these events. (RT at 131). Rodriguez's daughter, Nelida Sanchez, heard the man say he was going to kill the woman and saw the man point a gun at the woman's head. (RT at 192- 94). Deputy Padilla testified that when he interviewed Joyce after the incident, she was still crying, very upset, and visibly shaking. (RT at 230). Given the evidence of the assault on Joyce, the manner in which the threats to her life were made, and her emotional state both before and after Petitioner was arrested, a rational trier of fact could have found that Joyce suffered sustained fear and that her fear was reasonable under the circumstances. *Jackson*, 443 U.S. at 319. That Joyce did not testify about her fear does not undermine the conviction. *See*

People v. Ortiz, 101 Cal. App. 4th 410, 416, 417 (2002) (although victim of carjacking whom the defendant told to "shut up" "[i]f [he] want[ed] to live" never testified threat "put him in actual fear," reasonable to infer from all the circumstances he was in fear).

F. Ground Six: Juror Unanimity Instruction

Petitioner contends that the prosecutor argued two different factual theories of assault, one based on battery and one based on brandishing the firearm. Petitioner cites the following from the prosecutor's closing argument:

> But what happened in this particular case? Well, not only did -- he really actually committed a battery in this particular case, because the gun is actually pressed up against her head. But yeah, he takes the gun, he points it at her head, threatening to kill her. That's assault with a deadly weapon. He had the gun. He had every opportunity to complete the act, so i.e., an assault has been committed, with a firearm.

(RT at 322).

Petitioner claims that because the jury could have found him guilty of the assault with a firearm based on a battery with a firearm theory or brandishing a firearm theory, the trial court had a duty to instruct the jury that it must agree on the act that formed the basis of a guilty verdict. (Petition at 15-16).

In rejecting this claim, the California Court of Appeal found that the evidence pointed to only one act of assault with a gun, which was described slightly differently by Rodriguez and her daughter. (Lodgment 6 at 30-31). Rodriguez indicated

that Petitioner *put* the gun to the woman's temple and told her he was going to kill her. (RT at 132). Rodriguez's daughter, reported that Petitioner *pointed* the gun at the woman's temple and told her he was going to kill her. (RT at 193). The prosecutor did not argue two different legal theories or refer to two different assaults. (Lodgment 6 at 30). Even if Rodriguez saw one assault and her daughter saw another, the appellate court found that the assaults would have been so closely connected in time that they would have been part of a continuous course of conduct. Therefore, a unanimity instruction was not required. (Lodgment 6 at 31).

No clearly established Supreme Court law recognizes a Constitutional right to a unanimous verdict on the means by which a crime was committed. To the contrary, the Supreme Court has held that "a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict" on a particular theory of liability. *Schad v. Arizona*, 501 U.S. 624, 634 n. 5 (1991); *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 359-63 (1972); *see Richardson v. United States*, 526 U.S. 813, 821 (1999) ("this Court has not held that the Constitution imposes a jury-unanimity requirement, [citation]").

Moreover, as the appellate court found, a unanimity instruction was not required under state law, as the prosecutor did not argue two different legal theories or refer to two different assaults. (Lodgment 6 at 30-31). Therefore, Petitioner has failed to show that the trial court's alleged omission so infected the trial as to deprive him of the fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. *See Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988); *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977) (Where the

alleged error is the failure to give an instruction, the petitioner bears an "especially heavy").

The state court's rejection of Petitioner's unanimity instruction claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Ground Six of the Petition.

G. Ground Seven: Denial of Counsel on Motion for New Trial

Petitioner next contends that the trial court violated his Sixth Amendment rights when it denied his request for appointment of counsel in order to file a motion for new trial. (Petition at 19-23).

During the pretrial phase of this case, which lasted almost two years, Petitioner alternated requests for counsel and self- representation. Between July 2001 and December 2001, Petitioner represented himself for arraignment and at hearings on motions that he prepared *pro per*. (CT at 12-13, 24, 26, 28-30, 34-36, 49). A retained attorney, William Gebbie, represented Petitioner at the preliminary hearing in January 2002. (CT at 50-51). In March 2002, the trial court granted Petitioner's motion to represent himself. (CT at 92). In May 2002, at Petitioner's request, the trial court appointed a public defender, Michelle Anderson, to represent Petitioner. (CT at 206). In September 2002, Petitioner requested to proceed *pro per*, but his motion was denied. (CT at 246). In November 2002, the trial court relieved the public defender due to a conflict of interest. (CT at 253). A conflict defense panel attorney, Michael Belter, was appointed to represent Petitioner. (CT at 253). In February 2003, Petitioner sought and received

permission to represent himself. (CT at 255). Petitioner represented himself through trial. The jury returned its verdict on June 27, 2003. (CT at 491-97).

Immediately following the reading of the verdict, Petitioner informed the trial court that he wished to file a motion for new trial. (RT at 385). Petitioner also requested the reappointment of Belter, the conflict defense panel attorney, to prepare the motion for new trial. (RT at 385). The trial court denied Petitioner's request:

> Court: We aren't doing anything like that right now, Mr. Rodgers. If you have some request that you want to make a motion for something, I expect that you will do that and you will serve it, and you will file it, we will take it up at that time.

(RT at 385).

On July 16, 2003, Petitioner filed a written motion requesting the appointment of Belter "to perfect and file" a motion for a new trial. (CT at 508). In the alternative, Petitioner requested a copy of the trial transcript in order "to perfect and file his motion for new trial." (CT at 508).

On July 25, 2003, the trial court offered Petitioner the opportunity to be heard on his motion for appointment of counsel. (RT at 386). Petitioner declined oral argument. (RT at 386). The trial court denied the motion for appointment of counsel. (RT at 386). Moments later, the following exchange occurred:

> Petitioner: Your Honor, also, if you are going to deny counsel –
>
> Court: You are not going to get counsel, Mr. Rodgers. You made this election to represent yourself. Everybody tried to talk you out of it at the time. You insisted you

> wanted to do it. You are doing it. We aren't going to substitute in an attorney at this time.

(RT at 387). Petitioner responded that he still wanted to file a motion for new trial. (RT at 387). Petitioner stated that he could prepare the motion on his own, but he needed a copy of the trial transcript and an additional two months to "perfect the motion." (RT at 387-89). Petitioner asserted he had 10 to 15 grounds for his new trial motion, including claims based on newly discovered evidence and prosecutorial misconduct during closing argument. (RT at 387, 389). Not finding Petitioner's argument persuasive, the trial court denied the request for the transcript, but agreed to continue Petitioner's case over the weekend to the following Monday. (RT at 388-89A).

On July 28, 2003, Petitioner filed a motion called "Notice of Motion for New Trial - Motion for Continuance of Sentencing with Request for Transcript." (CT at 512-15). In the motion, Petitioner set forth a number grounds for his motion for new trial. (CT at 512-15; RT at 390). The trial court denied Petitioner's request for the trial transcript, finding that Petitioner had failed to set forth any reasons justifying preparation of the transcript at that time. (RT at 390-91). The trial court then asked Petitioner if there was any other reason why they should not proceed with sentencing. (RT at 391). Petitioner responded that he needed additional time to review his probation report and prepare a sentencing brief. (RT at 391-92). The trial court denied Petitioner's request and proceeded with sentencing. (RT at 391-92). When the trial court and the prosecutor began to discuss the possible length of the sentence, Petitioner informed the trial court that he was unfamiliar with the sections of the Penal

Code at issue in his case, and asked that they be explained to him. (RT at 394). The trial court responded, "Mr. Rodgers, if you had a lawyer, he could explain it to you." (RT at 395). Petitioner, however, did not request appointment of counsel for sentencing. Instead, Petitioner asked that he be allowed to bring his family members to court to speak on his behalf. (RT at 395). Despite the trial court's interest in proceeding with sentencing, it agreed to set over the matter for two days. (RT at 395).

On July 30, 2003, the trial court resumed Petitioner's sentencing hearing.[FN11] (RT at 397).

> FN11. Petitioner did not have any family members speak on his behalf at the hearing.

When the trial court and the prosecutor began discussing the statutory sentencing provisions, Petitioner expressed frustration and confusion. (RT at 400). The following exchange occurred:

> Petitioner: Again, Your Honor, you are disrespecting me and talking to him not me.
>
> Court: That's because you don't know what I am talking about, Mr. Rodgers.
>
> Petitioner: That's what I understand. That's no excuse.
>
> Court: I told you at the time that you did this that you would be held to the same standards as a lawyer. You are being held to the same standards as a lawyer. That's an election you made.
>
> Petitioner: I don't know why this is such a discrimination against pro per.

> Court: Not discriminating you [sic], sir. You are held to the same standards as a lawyer.
>
> Petitioner: That's not what the federal courts say, Your Honor.
>
> Court: You take it up with the federal court.
>
> Petitioner: I intend to. At this time I would like to file my notice of appeal, Your Honor.

(RT at 401-02).

Petitioner claims that by refusing to appoint counsel for the motion for new trial, the trial court violated his constitutional right to counsel at a critical stage in the proceedings.[FN12]

> FN12. Petitioner also claims that his request for counsel applied to all subsequent critical stages in the proceedings, including sentencing. (Petition at 18; Reply at 11-12).

In support of the argument Petitioner relies on *Menefield v. Borg*, 881 F.2d 696, 701 (9th Cir. 1989). In *Menefield*, the Ninth Circuit held that under California law, a motion for a new trial made before entry of the judgment of conviction is a "critical stage" of the criminal proceeding, because "it is the defendant's last opportunity for an unconstrained review on the merits of the evidence against him." *Id.* at 699. Once a defendant's case goes on appeal, "both jury conclusions and the factual decisions of the trial court are either immune from review or treated under a highly deferential standard." *Id.* (citing *People v. McDaniel*, 16 Cal.3d 156 (1976) and *People v. Love*, 51 Cal.2d 751 (1959)).

On direct review, the California Court of Appeal found that the trial court did not abuse its

discretion in denying Petitioner's post-verdict request for reappointment of counsel.[FN13]

> FN13. Petitioner also raised this claim in a *pro per* document filed with the California Court of Appeal. (Supp. Lodgment 2.)

(Lodgment 6 at 34-36 (citing *People v. Gallego*, 52 Cal. 3d 115, 164-65 (1990), *People v. Ngaue*, 229 Cal. App. 3d 1115, 1126-27 (1990)). In reaching this decision, the appellate court considered Petitioner's history of changing from self-representation to counsel-representation and the reasons given in support of the motion for appointment of counsel. (Lodgment 6 at 34-35). The record showed that Petitioner had switched "between representing himself and being represented by counsel at various times throughout the case." (Lodgment 6 at 34-35). The appellate court also noted that Petitioner failed to identify any facts or reasons to support his motion for appointment of counsel, declined the opportunity to submit oral argument, and even acknowledged that he could prepare a motion for new trial on his own. (Lodgment 6 at 35-36).

The court of appeal declined to follow the Ninth Circuit's decision in *Menefield*, noting that it had been rejected by both state and federal courts. (Lodgment 6 at 36 (citing *Ngaue, supra*, 229 Cal. App. 3d at 1124, and *United States v. Tajeddini*, 945 F.2d 458, 470 (1st Cir. 1991), *overruled in part on other grounds by Roe v. Flores-Ortega*, 528 U.S. 470 (2000)). The court of appeal also distinguished the facts in Petitioner's case from *Menefield*. Unlike the defendant in *Menefield*, who was confused about the intricacies of filing a motion for new trial under state law, Petitioner "expressed no difficulty with California's requirements for a new trial motion" and "assured

the court that he could 'do the motion' himself." (Lodgment 6 at 37).

To the extent Petitioner claimed that he was improperly denied counsel at sentencing, his claim was rejected because he never actually requested appointment of counsel at sentencing. (Lodgment 6 at 37). Even if Petitioner's request could be construed to apply to sentencing, the appellate court found that the implicit denial of the request was proper, given Petitioner's history in switching between self-representation and counsel-representation, and his failure to give any reasons in support of the motion for appointment of counsel. (Lodgment 6 at 37).

The state court's rejection of this claim was not contrary to or an unreasonable application of clearly established law as determined by the Supreme Court of the United States, nor was it an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Under the Sixth Amendment, a defendant is entitled to the assistance of counsel at every critical stage of a criminal prosecution. *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004); *United States v. Wade*, 388 U.S. 218, 224-25 (1967); *White v. Maryland*, 373 U.S. 59, 60 (1963). A critical stage is any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (holding that a defendant is entitled to be represented by counsel at deferred sentencing hearing); *see also Bell v. Cone*, 535 U.S. 685, 696 (2002) (defining a critical stage as "a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused"); *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961) (explaining that arraignment is a critical stage in a

criminal proceeding because "[a]vailable defenses may be as irretrievably lost, if not then and there asserted as they are when an accused represented by counsel waives a right for strategic purposes"); *White*, 373 U.S. at 60 (holding that a preliminary hearing is a critical stage).

Though the right to counsel is fundamental, a criminal defendant also has the reciprocal Sixth Amendment right to self-representation. *See Faretta v. California*, 422 U.S. 806, 834 (1975). Thus, a defendant may waive his Sixth Amendment right to counsel and represent himself "so long as relinquishment of the right is voluntary, knowing, and intelligent." *Montejo v. Louisiana*, 129 S.Ct. 2079, 2085 (2009); *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (holding that the right to counsel may be waived so long as his choice to do so is made voluntarily and knowingly, and with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it").

The Supreme Court has never squarely addressed whether a post- verdict motion for new trial is a critical stage in a criminal prosecution or whether the Sixth Amendment right to counsel exists for the filing of such a motion after a defendant has exercised a *Faretta* waiver. As noted however, the Ninth Circuit addressed both of these issues in *Menefield*, finding that a motion for a new trial is a critical stage of the prosecution under California law. 881 F.2d at 700.

In addition, the Ninth Circuit found that while "the right to counsel-once waived-is no longer absolute," there is a "strong presumption that a defendant's post-trial request for the assistance of an attorney should not be refused." *Id.* at 700. Therefore, it held that "at least in the absence of

extraordinary circumstances, an accused who requests an attorney at the time of a motion for a new trial is entitled to have one appointed, unless the government can show that the request is made for a bad faith purpose." *Id.* at 701.

While the Ninth Circuit's decision in *Menefield* is precedential, this is a section 2254 proceeding governed by the provisions of AEDPA. *Menefield* is a pre-AEDPA case. Under AEDPA, habeas corpus relief may not be granted unless the state court's adjudication of a claim resulted in a decision that was contrary to, or involved an unreasonable application of clearly established law, as determined by the Supreme Court, or the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). The Supreme Court has never held that the motion for new trial is a critical stage to which the right to counsel attaches, and this Court cannot rely solely on *Menefield* to find the state court's decision contrary to or an unreasonable application of clearly established federal law. *See Holley v. Yarborough*, 568 F.3d 1091, 1097-98 (9th Cir. 2009); *Earp v. Ornoski*, 431 F.3d 1158, 1182 (9th Cir. 2005) ("'precedent derived from an extension of a Supreme Court decision is not 'clearly established federal law as determined by the Supreme Court'") (quoting *Duhaime v. Ducharme*, 200 F.3d 597, 602-03 (9th Cir. 2000)). "Circuit precedent is relevant only to the extent it clarifies what constitutes clearly established law." *Earp*, 431 F.3d at 1184-85.

There is a split in the circuits as to whether a motion for new trial is a critical stage of the proceedings to which the right to counsel attaches.[FN14]

FN14. *See, e.g., United States v. Lee*, 513 F.2d 423, 424 (D.C. Cir. 1975) (finding that there is no right to counsel on a motion for a new trial); *United States v. Birrell*, 482 F.2d 890, 892 (2d Cir. 1973) (finding no abuse of discretion in district court's refusal to appoint counsel assist in the presentation of a motion for new trial), *contra Kitchen v. United States*, 227 F.3d 1014, 1019 (7th Cir. 2000) (holding defendant had a right to assistance of counsel in connection with postappeal, pre-trial motion for new trial); *Robinson v. Norris*, 60 F.3d 457, 458 (8th Cir. 1995) (holding post-trial motion for new trial based on ineffective assistance represents critical stage of criminal proceedings); *Johnston v. Mizell*, 912 F.2d 172, 176 (7th Cir. 1990) (post-trial motion for new trial is a critical stage in criminal proceedings).

Because the state appellate court's interpretation in this case was consistent with the interpretation of other federal courts on the same issue, it cannot be said that the state appellate court's decision was contrary to or an unreasonable application of clearly established federal law. *See Kessee v. Mendoza-Powers*, 574 F.3d 675, 679 (9th Cir. 2009) (holding that state court decision contrary to Ninth Circuit precedent was not contrary to or an unreasonable application of Supreme Court precedent, where state court's interpretation was consistent with the holdings of many other courts); 28 U.S.C. § 2254(d)(1). Accordingly, Petitioner is not entitled to relief on this claim.

Moreover, even if *Menefield* were binding precedent, the trial court implicitly found that Petitioner's request for reappointment of counsel was made in bad faith to delay the administration of justice and confuse the proceedings. *See Menefield*,

881 F.2d at 701; (*see* Lodgment 6 at 35-37). A finding of bad faith is supported by the record. During the two years it took for the case to get to trial, Petitioner switched between self-representation and representation by three different attorneys. (CT at 50-51, 206, 253). Petitioner complicated the proceedings by supplementing his counsels's motions with numerous *pro per* motions and pleadings, many of which were supported by lengthy argument and legal citation. (CT at 30-32, 36- 38, 94-95, 110-11, 113-18, 120-25, 127-29, 131-33, 136-39, 144-55, 161-65, 172-73, 175-76, 178-80A, 257-59, 261-70, 271, 294-304, 310- 11, 312-17, 339-44, 354-56A, 368-72, 383, 387, 388, 389). When given a chance to offer argument in support of his post-verdict request for appointment of counsel, however, Petitioner remained uncharacteristically silent. (RT at 386). That his request for counsel was simply a ploy to prolong the proceedings was evident from Petitioner's acknowledgment that he could prepare the motion for new trial on his own. (RT at 389). Finally, Petitioner demonstrated his intent to unnecessarily delay the conclusion of his case through his several attempts to set over sentencing, which included a request for a two-month continuance. (RT at 387, 391, 395).

Petitioner's claim that he was denied his Sixth Amendment right to counsel for sentencing also fails. It is well settled that sentencing is a critical stage in the proceedings to which the right to counsel attaches. *Mempa*, 389 U.S. at 134; *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *see also Robinson v. Ignacio*, 360 F.3d 1044, 1059 (9th Cir. 2006) (holding that a defendant who has waived his right to counsel may reassert that right at sentencing and counsel should not be denied without a sufficient reason). However, the California Court of Appeal correctly found that Petitioner never explicitly

requested appointment of counsel for sentencing. (Lodgment 6 at 37). Indeed, the record shows that Petitioner requested counsel for the limited purpose of preparing a motion for new trial. When requesting counsel after the jury returned its verdict, Petitioner told the trial court that he wanted his former counsel appointed to prepare a motion for new trial. (RT at 385). Similarly, in his written motion for appointment of counsel, Petitioner stated that he was requesting counsel "to perfect and file Defendant's Motion for a New Trial." (Lodgment 6 at 37; CT at 508; RT at 385). At no time did Petitioner ever request counsel for sentencing. Therefore, Petitioner's valid pretrial waiver of counsel remained in effect for sentencing. *See Arnold v. United States*, 414 F.2d 1056, 1059 (9th Cir. 1969) (holding that a valid waiver carries forward through all stages of a case unless a defendant expressly requests appointment of counsel in a later stage). Petitioner is therefore not entitled to relief on the claim that he was denied counsel at sentencing.

H. Ground Eight: State Law Challenge to Upper Term Sentences

Petitioner claims that the trial court erred by imposing consecutive upper term sentences of four years on the assault with a firearm conviction (Cal. Penal Code § 245(a)(2) and ten years on the gun use enhancement (Cal. Penal Code § 12022.5(a)(1)). (Petition at 19-23).

At the sentencing hearing, the trial court discussed the aggravating factors at issue in Petitioner's case. (RT at 399-400). In imposing the upper term on the assault with a firearm conviction, the trial court cited the following aggravating factors: (1) the crime involved violence and a threat of great bodily harm (Cal. R. Ct. 4.421(a)(1)); (2)

Petitioner's prior convictions as an adult were numerous and of increasing seriousness (Cal. R. Ct. 4.421(b)(2)), and (3) Petitioner served a prior prison term (Cal. R. Ct. 4.421(b)(3)). (RT at 399). With respect to the aggravated sentence on the gun enhancement, the trial court found the following: (1) Petitioner engaged in violent conduct that indicated a serious danger to society (Cal. R. Ct. 4.421(b)(1)) and (2) Petitioner's prior performance on parole was unsatisfactory (Cal. R. Ct. 4.421(b)(5)).[FN15] (RT at 400).

> FN15. The trial court also found that Petitioner was on parole when the crime was committed (Cal. R. Ct. 4.421(b)(4)), but Petitioner challenged this finding at the sentencing hearing. (RT at 400-01).

The trial court did not identify any circumstances in mitigation.

Petitioner contends that the trial court violated California's dual use prohibition by using his prior prison terms as aggravating factors to impose the upper term sentence on the assault with a firearm conviction (Cal. R. Ct. 4.421(b)(3)), while imposing consecutive one-year sentences for the two prior prison term enhancements (Cal. Penal Code § 667.5(b)). (Petition at 21 (citing Cal. Penal Code § 1170(b) and Cal. R. Ct. 4.420(c)). Petitioner also challenges the trial court's finding that the assault with a firearm involved violence and threat of great bodily harm (Cal. R. Ct. 4.421(a)(1)), as that factor was an element of the crime itself. (Petition at 22 (citing Cal. R. Ct. 4.420(d)). With regard to the upper term on the gun enhancement, Petitioner contends that there was insufficient evidence to show that his prior performance on parole was unsatisfactory (Cal. R. Ct. 4.421(b)(5))

or that his conduct indicated a serious danger to society (Cal. R. Ct. 4.421(b)(1)). (Petition at 22-23).

The California Court of Appeal rejected Petitioner's claim. (Lodgment 6 at 37-40). It found that Petitioner had forfeited his dual use argument by failing to object at sentencing and that the trial court cited proper aggravating factors supported by the evidence for the imposition of the upper term sentences. (Lodgment 6 at 38-40).

To the extent this claim differs from his claim in Ground Nine, it alleges only violations of state law, which cannot form the basis of a successful habeas claim. 28 U.S.C. § 2254(d); *Estelle v. McGuire*, 502 U.S. at 67-68; *see also Mendez v. Small*, 298 F.3d 1154, 1158 (9th Cir. 2002) ("[a] state court has the last word on the interpretation of state law"); *see also, e.g., Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (rejecting petitioner's claim that a state court misapplied its own aggravating circumstance because "federal habeas corpus relief does not lie for errors of state law").

Accordingly, Petitioner is not entitled to habeas relief on this claim.

I. Ground Nine: Sixth Amendment Challenge to Upper Term Sentences

Petitioner contends that the upper term sentences on the assault with a firearm conviction (four years) and gun use enhancement (ten years) were improperly based on factors not found true by a jury. Petitioner argues that he is entitled to relief under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"), *Blakely v. Washington*,

542 U.S. 296, 303 (2004) (holding that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"), and *Cunningham v. California*, 549 U.S. 270 (2007) (holding that under California law, the middle, not the upper term, is the relevant "statutory maximum" for *Apprendi* purposes, and a defendant is entitled to a jury finding on any factor other than a prior conviction before being sentenced to an upper term). (Petition at 19-24, 68).

Petitioner raised this claim on direct review in the California appellate courts. The appellate court found that Petitioner's claim was foreclosed by the California Supreme Court's then current decision in *People v. Black* (*Black I*), 35 Cal.4th 1238 (2005), which held that California's sentencing scheme was in compliance with the United States Constitution. (Lodgment 6 at 41-42).

Two years later, the Supreme Court reversed *Black I*, when it decided *Cunningham*, 549 U.S. 270. Thus, the state court's decision rejecting Petitioner's claim was contrary to clearly established Supreme Court law, to the extent it was based on *Black I*. *See Butler v. Curry*, 528 F.3d 624, 643, 641 (9th Cir. 2008). As such, in determining whether there was a Sixth Amendment violation, this Court will apply a *de novo* standard of review. *See Franz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008); *Butler*, 528 F.3d at 641.

A sentencing court may, in compliance with the Sixth Amendment, sentence a defendant to the upper term where that decision rests on the "fact of a prior conviction," even where a jury has not made the factual finding of the prior conviction. *Butler*, 528 F.3d at 645 ("[T]he fact of a prior conviction is the only fact that both increases a penalty beyond

the statutory maximum and can be found by a sentencing court."); *Apprendi*, 530 U.S. at 487-90. To comply with California law, "only one aggravating factor is necessary to set the upper term as the maximum sentence." *Id.* at 643 (citing *People v. Black* (*Black II*), 41 Cal. 4th 799, 805 (2007)). Thus, "if at least one of the aggravating factors on which the judge relied in sentencing [the petitioner] was established in a manner consistent with the Sixth Amendment, [the petitioner's] sentence does not violate the Constitution." *Id.* Even if there was a Sixth Amendment violation, habeas relief is warranted only if the sentencing error was not harmless. *See Washington v. Recuenco*, 548 U.S. 212 (2006) (holding that sentencing errors are subject to harmless error analysis).

As discussed above, in imposing the upper term sentence on the assault with a firearm conviction, the trial court found, in part, that Petitioner suffered numerous prior convictions of increasing seriousness. (RT at 399). The record supports the trial court's finding. Petitioner's probation report identifies 23 convictions spanning over 24 years for crimes such as assault and battery, receiving earnings of a prostitute, pandering, kidnapping, gross sexual imposition, child stealing, and attempted rape. (CT at 519-20); *People v. Searle*, 213 Cal. App. 3d 1091, 1098 (1989) (holding that three prior convictions are "numerous"). As this finding falls within *Apprendi's* prior conviction exception, no jury determination was necessary to impose the four-year upper term sentence on the assault with a firearm conviction. *Cunningham*, 127 S. Ct. at 869; *Apprendi*, 530 U.S. at 487-90; *Blakely*, 542 U.S. at 301; *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Butler*, 528 F.3d at 643-44.

The aggravating factors cited by the trial court to support the upper term on the gun use enhancement; i.e. that Petitioner engaged in violent conduct that indicated a serious danger to society and Petitioner was on parole when the crime was committed; did not fall within the prior conviction exception. Nevertheless, as noted above, the trial court specifically considered Petitioner's lengthy criminal history at sentencing. While the trial court did not explicitly rely on Petitioner's prior criminal history in imposing the upper term on the gun enhancement, that fact, by itself, rendered Petitioner eligible for the upper term sentence. *Black II*, 41 Cal. 4th at 813 ("so long as a defendant is eligible for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury"). Thus, the imposition of the upper term on the gun enhancement did not violate Petitioner's Sixth Amendment right to a jury trial, regardless whether the trial court engaged in additional fact finding. *See, e.g., People v. Velasquez*, 152 Cal. App. 4th 1503, 1515-17 (2007) (finding no *Blakely* error where trial court did not state any reasons for imposing upper term sentence, but did make findings relating to defendant's prior criminal record in imposing consecutive sentences and where numerous prior convictions and prior prison term were listed in probation report and sentencing memorandum); *see also Makboul v. Knowles*, 2009 WL 2710149 (C.D. Cal. 2009) (finding that petitioner's upper term sentence

arguably was authorized by trial court's reference to petitioner's "long history of criminal behavior" in imposing consecutive sentence, even though the trial court did not specifically base the upper term sentence on petitioner's criminal history).

Further, even if there was a Sixth Amendment violation, the error was harmless. *Butler*, 528 F.3d at 648; *see Washington*, 548 U.S. 212. Here, the Court is confident that a jury would have found beyond a reasonable doubt that Petitioner "engaged in violent conduct, indicating he was a danger to society." Cal. R. Ct. 4.421(b)(1). *See United States v. Salazar-Lopez*, 506 F.3d 748, 755 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 2523 (2008) (holding trial court's imposition of e nhanced term harmless because trial court relied on a fact supported by evidence which was "overwhelming and uncontroverted") (internal quotation marks omitted); *United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006) (holding trial court's imposition of enhanced term harmless because trial court relied on a fact supported by "overwhelming and uncontroverted evidence"); *Fennen v. Nakayema*, 494 F.Supp.2d 1148, 1156 (E.D. Cal. 2007) (holding trial court's imposition of upper term harmless because trial court relied on a fact which was undisputed at trial and "the same result would have obtained had a jury been asked to find this fact"). The evidence showed that Petitioner put a gun to Joyce's head, struck her, and threatened to kill her. Considering this evidence, together with Petitioner's criminal history, there is little doubt that had the issue been submitted to the jury, the jury would have found beyond a reasonable doubt that Petitioner engaged in violent conduct, indicating he was a danger to society. Cal. R. Ct. 4.421(b)(1). *Butler*, 528 F.3d at 648 (habeas relief may be granted only

if the court is "in 'grave doubt' as to whether a jury would have found the relevant factors beyond a reasonable doubt"). Accordingly, Petitioner is not entitled to habeas relief on this claim.

J. Ground Ten: Right to Self-Representation on Appeal

Petitioner contends that the state appellate court violated his Sixth Amendment right to represent himself on appeal. (Petition at 24). This claim was considered and rejected by the California Court of Appeal. (Supp. Lodgments 1, 2, 5, 6, Lodgment 38).

Once a jury makes a finding of guilt, the balance of interests between the state and the accused changes. *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162 (2000) ("The status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict"). There is no Sixth Amendment right to self-representation on direct appeal. *Martinez*, 528 U.S. at 163 (concluding that the constitutional right to represent oneself does not extend to the appellate process under either the Sixth Amendment or the Due Process Clause). *Accord Douglas v. California*, 372 U.S. 353, 357-58 (1963) (the right to counsel on the first appeal of right is based on the Fourteenth Amendment Equal Protection Clause and not the Sixth Amendment). Because there is no federal constitutional right to self- representation on appeal, Petitioner is not entitled to relief.

K. Grounds Eleven: Ineffective Assistance of Appellate Counsel

In Ground Eleven, Petitioner contends that appellate counsel was ineffective because the claims raised in Grounds Twelve through Twenty-One of

the Petition were not raised by appellate counsel on appeal. (Petition at 24-68). Petitioner's claims lack merit.

While Petitioner's direct appeal was pending, Petitioner, proceeding *pro per*, filed a number of documents in the California Court of Appeal raising many of the claims he asserts in Grounds Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, and Twenty-One of the Petition.[FN16]

> FN16. Petitioner filed the following documents in the California Court of Appeal: 1) Notification of Ten Additional Assignments of Error; Motion to Appoint New counsel to Brief the Additional Errors Listed (Supp. Lodgment 2); Motion for Leave to Accept Appellant's Supplemental Brief in a Habeas Form Pro Per and Supplemental Brief (Supp. Lodgment 3); 3) Addendum to Filed Habeas Corpus (Supp. Lodgment 4); and 4) Motion to Proceed in Pro Per on Appeal (Supp. Lodgment 5). The California Court of Appeal construed these documents cumulatively as a "motion for substitution of appellate counsel on the ground of ineffective assistance." (Supp. Lodgment 6 at 1).

The California Court of Appeal considered and rejected these claims in a reasoned decision. (Supp. Lodgment 6). It follows, therefore, that any claims of ineffective assistance of appellate counsel based on these meritless and unsuccessful claims must also fail. *See Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective assistance."). Even if the issues had been raised on appeal, there is no reasonable probability that the California Court

of Appeal would have found in Petitioner's favor, as discussed more fully below. Thus, appellate counsel's decision to not include these arguments on appeal did not prejudice Petitioner within the meaning of *Strickland*. *Miller*, 882 F.2d at 1434; *Strickland*, 466 U.S. at 694.FN17

> FN17. It appears that Petitioner may be attempting to assert the claims raised in Grounds Twelve through Twenty-One as both standalone federal constitutional claims as well as state law claims that were not raised on appeal due to the ineffective assistance of appellate counsel. (Petition at 24-68). Therefore, in addressing the claims raised in Grounds Twelve through Twenty-One, both state and federal authority will be cited where appropriate.

L. Ground Twelve: Failure to Raise Sufficiency of the Evidence Claim

Petitioner contends that there was insufficient evidence of his identity as the perpetrator of the assault upon Joyce. Petitioner notes Joyce denied she had been assaulted, Rodriguez did not identify the victim by name in the courtroom, and there was a lack of any corroborating fingerprint evidence. (Petition at 25-28). Such factors, however, do not negate the California Court of Appeal's finding that there was substantial evidence supporting Petitioner's assault with a firearm conviction. (Supp. Lodgment 6 at 2).

The evidence showed that from her bedroom window, Rodriguez saw an African American man and a African American woman standing in front of a red car in a parking lot approximately 50 to 100 feet away. (RT at 125-27, 132-34, 175). The man put a handgun to the woman's head. (RT at 125-27, 132-34, 175). While Rodriguez was on the

telephone with the police, she observed a police car pull up next to the couple and their red car. (RT at 136-37, 144). The arresting officer identified the man as Petitioner and the woman as Petitioner's wife Joyce. (RT at 204-05, 210). This evidence linking Petitioner to the assault on Joyce was sufficient evidence to allow a reasonable jury to find Petitioner guilty of assault with a firearm beyond a reasonable doubt. (Supp. Lodgment 6 at 2); *Jackson*, 443 U.S. at 319.

M. Grounds Thirteen, Fourteen, and Seventeen: Prosecutorial Misconduct Based on False Evidence and Withholding Evidence

Petitioner contends the prosecutor engaged in prosecutorial misconduct by offering false or perjured testimony at trial and by withholding evidence concerning a material defense witness. (Petition at 29-35, 50-55).

Prosecutorial misconduct can warrant relief under the federal Constitution when a prosecutor's misconduct renders a trial "fundamentally unfair." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *cf. People v. Samayoa*, 15 Cal.4th 795, 841 (1997) (under California law, conduct by a prosecutor that does not otherwise render a criminal trial fundamentally unfair will nonetheless constitute misconduct if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury"). To warrant habeas relief on the basis of a prosecutorial misconduct, the misconduct must have amounted to a violation of due process and have had a substantial and injurious effect or influence in determining the jury's verdict. *See Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995)

(citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

1. False Evidence

Petitioner contends that Rodriguez committed perjury when she testified that she saw Petitioner with a gun on the night of the incident and that Petitioner put the gun to the woman's head. (RT at 131-32, 137, 145, 162). Petitioner claims that Rodriguez's testimony was false, as she told the 911 dispatcher that she did not see any weapons. (Petition at 29). Petitioner speculates that Rodriguez changed her story about seeing a gun after she was interviewed by the prosecutor's investigator, Edward G. Ramirez, because she had been threatened with deportation. (Petition at 51-52). Petitioner's claim lacks merit.

When a prosecutor obtains a conviction by the use of testimony which he or she knows or should know is perjured, such conviction must be set aside if there is any reasonable likelihood that the testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97 (1976); *People v. Marshall*, 13 Cal.4th 799, 830 (1996) (to establish a claim of prosecutorial misconduct based on the use of false evidence, a defendant must establish by a preponderance of the evidence that the testimony was indeed false and that the evidence materially affected the outcome of the trial). The same result obtains when the prosecutor, although not soliciting false evidence, allows it to go uncorrected when it appears. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). If the prosecutor knows that a witness has lied, the prosecutor has a constitutional duty to correct the false impression of the facts. A factual basis for attributing knowledge to the government that the testimony was perjured must be

established. *See Morales v. Woodford*, 388 F.3d 1159, 1179 (9th Cir. 2004).

Petitioner has not shown that Rodriguez's testimony was false or that the prosecutor knew that Rodriguez was testifying falsely in any respect. Rodriguez testified and was subject to cross-examination and impeachment by available evidence. This afforded Petitioner a fair trial and comported with due process. Any inconsistency in Rodriguez's statements about whether she saw a gun on the night of the incident became readily apparent to the jury when Petitioner called the 911 dispatcher to testify at trial. The dispatcher confirmed that she had asked Rodriguez whether she had seen any weapons, and Rodriguez stated that she had not. (RT at 305-06). While Rodriguez's trial testimony and the 911 call are somewhat contradictory, there is no showing that the prosecutor introduced false evidence.

Petitioner also asserts that Rodriguez committed perjury when she identified Petitioner as the perpetrator. (Petition at 32-35). At trial, Rodriguez testified on direct examination that she would not be able identify the man that who assaulted the woman if she were to see them again. (RT at 127). However, on cross-examination, when Petitioner asked Rodriguez if she saw the perpetrator in court, Rodriguez gave a different response. (RT at 140). Rodriguez stated, "Well, looking at him, I am remembering that it was him. But if I would have seen – amongst a lot of persons, then, no, I would not have thought it was him." (RT at 140). On redirect examination, Rodriguez indicated that she was 100 percent sure that Petitioner was the man she saw. (RT at 176).

Petitioner's claim of prosecutorial misconduct falls short because he has not

established that the testimony given by Rodriguez was false or perjured. (*See* Supp. Lodgment 6 at 2-3). Although Rodriguez changed her testimony, Petitioner has offered no evidence that she purposely fabricated her testimony. *See United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) (stating that fact that witness may have made an earlier inconsistent statement, or that other witnesses have conflicting recollections of events, does not establish that the testimony offered at trial was false). *People v. Young*, 34 Cal.4th 1149, 1181 (2005) (mere conflicts and inconsistencies in testimony believed by the jury do not undermine its factual determinations; unless testimony is physically impossible or inherently improbable, it is sufficient to support a conviction). Rodriguez gave a reasonable explanation that she was able to recognize Petitioner as the perpetrator after seeing him in court. (RT at 141). Rodriguez also testified that hearing Petitioner's voice in court helped her to recognize him. (RT at 186). Accordingly, this claim did not constitute a basis for reversal of Petitioner's conviction.

2. Suppression of Material Witness

Petitioner contends that the prosecutor improperly withheld information concerning the whereabouts of Rodriguez's husband, Francisco Sanchez. (Petition at 26-27, 51). On the night of the incident, Sanchez looked out of his bedroom window and told Rodriguez to go back to sleep because the couple was "just arguing." (Petition at 26-27, 51; *see* RT at 175-76). Petitioner claims that Sanchez was a material defense witness because his testimony would have impeached Rodriguez. (Petition at 26-27, 51).

"[T]he suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Here, Petitioner has not provided any proof in support of his claim that the prosecutor suppressed information concerning Sanchez. Rather, the record actually shows that the prosecutor attempted to locate Sanchez for trial, but had been unsuccessful. (RT at 64-66). Moreover, Petitioner has failed to establish materiality, as the jury was aware of Sanchez's opinion that the couple was "just arguing" through Rodriguez's testimony at trial. (RT at 175-76). Thus, Petitioner's conclusory allegations are insufficient to merit relief. *Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir. 1995) (vague speculation or mere conclusions unsupported by record not sufficient to state claim; "conclusory suggestions that ... trial and state appellate counsel provided ineffective assistance fall far short of stating a valid claim of constitutional violation"); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

N. Ground 18: Prosecutor's Comments During Closing Argument

Petitioner contends that the prosecutor engaged in misconduct during closing argument by misstating the evidence, making improper comments, and vouching for witnesses. (Petition at 8, 56-64).

The California Court of Appeal found that Petitioner forfeited this claim by failing to object at trial. (Supp. Lodgment at 3-4). Therefore, this claim

is procedurally defaulted. *See Davis*, 384 F.3d at 654; *Vansickel*, 166 F.3d at 957-59; *Rich*, 187 F.3d at 1069-70; *Bonin v. Calderon*, 59 F.3d 815, 842-43 (9th Cir. 1995). Even if Petitioner had not forfeited this claim, Petitioner has not established that the prosecutor engaged in misconduct, for the reasons discussed below.

1. Rodriguez's Identification of Joyce

Petitioner first takes issue with the prosecutor's suggestion that Rodriguez testified that she witnessed an argument between Petitioner and Joyce.[FN18] (Petition at 56)

> FN18. In particular, Petitioner challenges the following portion of the prosecutor's closing argument:
>
> You have heard, first from Sandra Rodriguez. And basically, what you heard from her was that this argument had occurred between Mr. Rodgers and his wife lasted for quite some time and that finally because of the nature of what Mr. Rodgers was doing to Mrs. Rodgers, i.e., point the gun at her head, she figured she had probably heard and seen enough and now it's time to get the police involved.

(RT at 317).

Petitioner claims the prosecutor's comment was impermissible, as Rodriguez never identified Joyce as the victim and never testified that she heard Petitioner and Joyce arguing. (Petition at 56).

A prosecutor is given wide latitude in arguing to the jury, and is entitled to argue reasonable inferences from the evidence. *United States v. Birges*, 723 F.2d 666, 671-72 (9th Cir. 1984); *Duckett v. Godinez*, 67 F.3d 734, 742 (9th Cir. 1995); *see also People v. Hill*,

17 Cal.4th 800, 819 (1998). Here, while the prosecutor did not recite Rodriguez's testimony verbatim, it was reasonable to infer from the combined testimony of Rodriguez and Deputy Bowen that Petitioner had been identified as the perpetrator and Joyce had been identified as the victim. (RT at 137, 205, 210). Thus, the prosecutor's remarks did not constitute misconduct.

2. Vouching for Rodriguez

Petitioner contends that the prosecutor improperly vouched for Rodriguez when he argued that there was no reason for her to lie.[FN19]

> FN19. In closing, the prosecutor argued as follows:
>
> Well, Miss Rodriguez told you she really didn't want to be here. She never really wanted to come to court. You heard over and over again that she was reluctant to come in, didn't really want to keep going over the story, time and time again. But she did, when asked, tell everyone that happened essentially.
>
> And you have to ask yourself, you know, why would she be lying about this? There is absolutely no reason to be lying about this. She didn't want to be here. If she was going to lie, she would have said: This never happened. I don't want to come to court. I don't know what you are talking about. But that's not what happened. She told the truth, was pretty clear that she was telling the truth from the stand.
>
> (RT at 317).
>
> Later during closing argument, the prosecutor argued:
>
> It's not reasonable to assume that they would all get together and concoct this

> story about seeing Mr. Rodgers pointing a gun at his wife's head and threatening to shoot her, threatening to kill her. That's just not reasonable. Especially given the witnesses who have absolutely no reason to lie in this particular case, no motive whatsoever. They don't know Mr. Rodgers, never seen him before, don't have any reason to wish him ill.
>
> (RT at 321).

However, statements in closing argument do not constitute vouching if focused on inferences that can be drawn from evidence in the record and do not imply that the government is assuring a witness's veracity. *United States v. Necoechea*, 986 F.2d 1273, 1277-81 (9th Cir. 1993). Here, the record shows that the prosecutor simply asked the jury to find, based on the evidence they had heard, that Rodriguez had no apparent bias that would lead her to provide false or distorted testimony in this case. In addition, the prosecutor explained to the jury that it was their responsibility to judge the witnesses's credibility. (RT at 317). In arguing that the jury should find Rodriguez credible, the prosecutor simply applied that principle to Rodriguez. (RT at 317, 321). Accordingly, Petitioner's claim of prosecutorial misconduct is not persuasive.

3. Misstating the Evidence

Next, Petitioner claims the prosecutor committed misconduct numerous times during closing argument by misstating the evidence to mislead the jury. (Petition at 56-64). For example, Petitioner contends that the prosecutor improperly argued the following facts: Deputy Bowen spoke to Rodriguez and Rodriguez's daughter on the

night of the incident;[FN20] the jury would have to find that Joyce, Deputy Bowen, and Deputy Padilla were part of a conspiracy to convict Petitioner to find Petitioner's conspiracy theory believable;[FN21] Joyce told police that she had been "fighting" with Petitioner; Petitioner caused Joyce to experience "sustained fear" by pointing a gun to her head and making threatening statements; Rodriguez was indifferent to the race of the perpetrator; Petitioner refused to show the jury respect by wearing a suit to court;[FN22] Petitioner knew how to locate Joyce; and Petitioner suffered prior felony convictions. (Petition at 56-64).

> FN20. Petitioner challenges the following portion of the closing argument as improper:
>
> Deputy Bowen, who is doing his job, responds to a call, sees Mr. Rodgers in this red car that Miss Rodriguez and Nelida see him in.
>
> (RT at 319).

> FN21. The prosecutor stated as follows:
>
> Because his story -- his story about the police officers or the deputy -- especially I guess Deputy Bowen planting the gun the trunk of his car. It's just not reasonable. Because let's think about it. If that were the case, there would have to be a pretty big conspiracy against Mr. Rodgers for that to be true. And essentially, Mrs. Rodgers would have to be in on it too, because all of these people would have to be lying. Miss Rodriguez would have to be lying. Her nine-year old daughter at the time would have to be lying.
>
> (RT at 319-20).

> FN22. The record shows that Petitioner declined the judge's offer to obtain street clothes for him and elected to proceed to trial in an orange jail uniform. (RT 2, p. 1.) The prosecutor mentioned the jumpsuit in the context of arguing that Petitioner was attempting to engender sympathy for himself. (RT at 348).

The challenged portions of the prosecutor's closing argument appear to have been fair comments on the evidence and reasonable inferences to be drawn therefrom. But even if the prosecutor misstated the evidence, his statements were not so egregious as to rise to the level of prosecutorial misconduct. *Smith v. Phillips*, 455 U.S. at 219; *Samayoa*, 15 Cal.4th at 841; *see also United States v. Parker*, 241 F.3d 1114, 1119-20 (9th Cir. 2001) (concluding that prosecutor's minor misstatement did not require reversal where other evidence pointing to guilt made misstatement not central to the case). Moreover, any possible prejudice was ameliorated by the trial court's admonishment that the lawyer's comments were not to be considered evidence. (CT at 416; RT at 353). It is presumed the jurors followed the court's instruction. *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985) (the Supreme Court "presumes that jurors, conscious of the gravity of their task, attend closely [to] the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them"); *People v. Boyette*, 29 Cal.4th 381, 436 (2002) (finding no prejudice from alleged prosecutorial misconduct because the trial court

properly instructed on the law and the jury is presumed to have followed its instructions).

O. Ground Fifteen: Judicial Bias

Petitioner claims that the trial court was biased against him. (Petition at 7, 36-49). Specifically, Petitioner claims that the trial court made improper remarks about Petitioner's decision to represent himself at trial, interfered with Petitioner's cross- examination of Rodriguez, directed the prosecutor to object to Petitioner's cross-examination of Deputy Bowen, denied Petitioner's request for counsel to file the motion for new trial, denied Petitioner's request to introduce the testimony of the defense investigator concerning an interview with Joyce, refused to admit the 911 audiotape at trial, and allowed the testimony of the prosecution's surprise witness, Deputy Padilla. (Petition at 30, 36-49). To succeed on a judicial bias claim, however, a petitioner must "overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see People v. Chatman*, 38 Cal.4th 344, 364 (2006).

Here, Petitioner has not shown actual bias or an incentive to be biased sufficiently strong to overcome the presumption of judicial integrity. *Paradis v. Arave*, 20 F.3d 950, 958 (9th Cir. 1994) (a petitioner may show judicial bias in one of two ways, by demonstrating the judge's actual bias or by showing that the judge had an incentive to be biased sufficiently strong to overcome the presumption of judicial integrity); *Withrow*, 421 U.S. at 47; *Chatman*, 38 Cal.4th at 364.

Although the trial court may have made negative comments about Petitioner's decision to represent himself, "[j]udicial remarks during the

course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (upholding the denial of a recusal motion).

The trial court's comments during Petitioner's cross-examination of Rodriguez and Deputy Bowen appear to have been efforts to simply facilitate the trial, and did not reflect bias or prejudice against Petitioner. *Id.* at 555-56.

While some of the trial court's evidentiary rulings and its denial of Petitioner's request for counsel at the motion for new trial stage may have been adverse to Petitioner's interests, such rulings do not support reversal based on a claim of judicial bias. *See, e.g., United States v. Gallagher*, 576 F.2d 1028, 1039 (1978) ("incorrect rulings dc not prove that a judge is biased or prejudiced").

Finally, any alleged error in excluding Joyce's interview with the defense investigator and the 911 tape was harmless, as Joyce's claim that Petitioner did not assault her was admitted through Deputy Bowen's testimony (RT at 211), and Rodriguez's statement that she did not see the suspect with a gun was admitted through the testimony of the 911 dispatcher. (RT at 305-06). Thus, Petitioner has not established judicial bias warranting relief.

P. Grounds Sixteen and Nineteen: Vindictive Prosecution

Petitioner contends that the prosecution engaged in vindictive or malicious prosecution by bringing the additional charges of assault with a firearm and making criminal threats against him because he refused to accept a plea bargain. (Petition at 50, 65-67). This claim also lacks merit.

The record demonstrates that the prosecutor's decision to add the charges of assault with a firearm and making criminal threats was occasioned by the discovery of new evidence. On July 17, 2001, two days after the incident with Joyce, the prosecutor filed a criminal complaint against Petitioner alleging the following three counts: felon in possession of a firearm; felon in possession of ammunition; and driving without a license. (Supp. Lodgment 6 at 4; CT at 1). On July 19, 2001, the prosecutor offered Petitioner a plea bargain for this case, together with another unrelated case. (Supp. Lodgment 6 at 4). Petitioner rejected the offer. (Supp. Lodgment at 4). In August 2001, the prosecutor filed an amended felony complaint adding the assault with a firearm charge after the prosecutor's investigator, Edward Ramirez, interviewed Rodriguez and her daughter Nelida. (Supp. Lodgment 6 at 4; CT at 21-22). Petitioner's preliminary hearing was held on January 8, 2002. (CT at 52-81). Investigator Ramirez testified about his interview with Rodriguez and her daughter Nelida. (CT at 68-75). Rodriguez and Nelida had both seen the perpetrator hold or point a gun to the victim's head and threaten to kill her. (CT at 68-75). A week after the preliminary hearing, the prosecutor filed the information, which included the additional charge of making criminal threats. (CT at 82-84).

The California Court of Appeal rejected Petitioner's claim of vindictive prosecution, noting that the amendments to the charging documents were merely based on the discovery of new evidence. (Supp. Lodgment 6 at 4). The Court agrees with the State court's reasoning and conclusion.

A denial of due process in the form of a vindictive or retaliatory prosecution occurs when a

charging decision is motivated by a desire to punish the defendant for doing something the law allows him to do. *United States v. Ulteras*, 2009 WL 5184203 *1-2, (9th Cir. 2009); *United States v. Jenkins*, 504 F.3d 694, 699-700 (9th Cir. 2007); *People v. Bracey*, 21 Cal. App. 4th 1532, 1549 (1994). However, before trial commences, *i.e.*, before jeopardy attaches, no presumption of vindictiveness applies, even where there is some appearance of vindictiveness. *United States v. Goodwin*, 457 U.S. 368, 384 (1982); *People v. Michaels*, 28 Cal. 4th 486, 515 (2002); *People v. Edwards*, 54 Cal.3d 787, 828 (1991) (jeopardy is an important factor in determining vindictiveness). Pretrial, it is up to a defendant to show with objective evidence that the state's charging decision was based upon improper considerations. *Goodwin*, 457 U.S. at 384; *Bracey*, 21 Cal. App. 4th at 1549.

Here, it was well within the prosecutor's discretion to file charges in conformity with the seriousness of the crimes upon the discovery of the new evidence, as jeopardy had not attached. *Goodwin*, 457 U.S. at 382; *People v. Matthews*, 183 Cal. App. 3d 458, 463-467 (1986) (refiling an action to add enhancements after a failed plea bargain does not demonstrate vindictive prosecution). Thus, Petitioner has not demonstrated vindictive or retaliatory prosecution Next, Petitioner asserts that the prosecutor engaged in misconduct by arbitrarily naming Joyce as the victim, as there was no evidence indicating that Petitioner assaulted Joyce. (Petition at 65-68). Petitioner's conclusory allegations are belied by the record. As discussed above, the combined testimony of Deputy Bowen and Rodriguez was sufficient to identify Petitioner as the gunman and Joyce as the victim. (*See* Supp. Lodgment 6 at 3).

Petitioner also complains that the prosecutor's charging decision was motivated in response to the filing of a civil rights action by Petitioner,[FN23] constituted abuse of process and authority, genocidal racism, domestic war crimes, and a RICO violation.

> FN23. The Court notes that on September 10, 2001, Petitioner filed a civil rights action, *Rodgers v. Deputy Sheriff Gary Bowen*, etc., EDCV 01-00640-VAP (MLG) in this Court alleging civil rights violations arising from the search and seizure of his vehicle and his arrest on July 15, 2001. Petitioner was ordered to show cause why the action should not be dismissed pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). On October 11, 2001, Plaintiff filed a "motion to dismiss without prejudice," conceding that the action was premature and requesting voluntary dismissal, subject to refiling. On October 19,2001, this Court granted Petitioner's motion an dismissed the civil rights action without prejudice.

(Petition at 66). Because these allegations are vague, conclusory and do not state a claim for habeas relief, the Court finds that summary rejection of such claims is appropriate. *See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (summary dismissal of a habeas claim is appropriate "where the allegations in the petition are vague and conclusory"); *see In re Swain*, 34 Cal.2d 300, 304 (1949) (summarily dismissing a petition for writ of habeas corpus based on vague conclusory allegations without factual support).

Q. Ground Twenty: Upper Term Sentence

Petitioner claims that his upper term sentences on the assault with a firearm conviction and gun enhancement violated his constitutional rights. (Petition at 68). For the reasons discussed in Section I above, this claim lacks merit.

R. Ground Twenty-One: Cumulative Error

Finally, it appears that Petitioner is claiming that the cumulative effect of the errors alleged in the Petition require reversal.[FN24]

> FN24. Specifically, Petitioner claims cumulative error as follows:
>
> "Judicial activism of pre-trial conditional terrorist threats against petitioner with dire prophesy of his imprisonment. Judicial prospective jurors, voir dire "tainting" with inculcation and embracery; second prosecutor - judicial bias/prejudice, bigotry and discrimination against pro se petitioner. Prosecutorial conspiracy to perjury, subornation. Percipient witness Rodriguez perjurious testimony. Malicious, retaliatory, vindictive, vicious "race-hate" prosecution. Gross, prosecutorial, prejudicial misconduct during voir dire and closing arguments - plain error of constitutional magnitude a complete denial of a fair trial and the rule of law was suspended by the trial judge. The verdict was contrary to the law, evidence and perversed. 5th, 6th, and 14th USC. Amendment 28 2254(d)(1)."

(Petition at 68).

(Petition at 68); see *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (The combined effect of multiple trial errors may give rise to a due process

violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal); *see also People v. Cunningham*, 25 Cal. 4th 926, 1009 (2001) ("[a] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"). Each of Petitioner's claims have been addressed in detail above. The alleged errors, even when considered together, did not rise to the level of a due process violation or result in prejudicial error. *Parle*, 505 F.3d at 927; *Cunningham*, 25 Cal. 4th at 1009. Accordingly, Petitioner is not entitled to relief on his claim of cumulative error.

V. Recommendation

For the reasons stated above, it is recommended that the Petition be **DENIED**.

DATED: March 19, 2010

_____

Marc L. Godman
United States Magistrate Judge

APPENDIX E

FILED August 18, 2005

CERTIFIED FOR PARTIAL PUBLICAITON*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,
v.
OTIS LEE RODGERS,
Defendant and Appellant

No. E034205.
33 Cal.Rptr.3d 163 (2005)

OPINION

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

Review Granted Nov. 30, 2005.
Review Dismissed,
Cause Remanded July 11, 2007.

APPEAL from the Superior Court of Riverside County. J. Thomspon Hanks, Judge. Affirmed.

Mark S. Devore, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gill P. Gonzalez, Supervising Depty Attorney General, and Stacy A. Tyler, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant was convicted by a jury of assault with a firearm (*165 Pen.Code, § 245, subd. (a)(2); count 1),[FN1] possession of a firearm by a convicted felon (§ 12021, subd. (a)(1); count 2), possession of ammunition by a convicted felon (§ 12316, subd. (b)(1); count 3), and making criminal threats (§ 422; count 4). The jury also found true certain enhancement allegations and the court found true two prison priors allegations. (§§ 667.5, 12022.5, subd. (a)(1), 1192.7, subd. (c)(8) & 12022.1.) Defendant was sentenced to a total of 16 years in prison.

> FN1. All further statutory references are to the Penal Code unless otherwise indicated.

In the published portion of this opinion, we consider whether police, acting on information provided by an anonymous tipster, were justified in stopping defendant as he was driving out of an apartment complex at 3:45 a.m. We hold that the stop was justified. While the officer made no observation that an occupant of the car was involved in criminal activity, he did make observations consistent with the anonymous tip. This consistency, in conjunction with an anonymous tip that concerned ongoing criminal conduct posing an imminent serious threat to human life, was sufficient to justify the present stop. In the unpublished portion of the opinion, we reject defendant's other contentions. We affirm the judgment.

II. MOTION TO SUPPRESS EVIDENCE

A. *Facts Presented at Motion to Suppress Hearing*

Prior to trial, defendant moved to suppress evidence obtained in a search of his car. At the hearing on the motion to suppress, Riverside County Sheriff's Deputy Gary Bowen testified that he was on

patrol at approximately 3:41 a.m. in the Rubidoux area of Riverside County. He received a call from dispatch indicating that a Black male and Black female were in a red sedan in the driveway area of the Garden Estates Apartments. The dispatcher told Bowen that the caller stated that she heard the male say that he was going to shoot and kill the female.

Neither the recordings nor transcripts of the dispatch communication or the 911 call were submitted into evidence at the suppression hearing. Although testimony at trial indicated that the police were able to identify the anonymous caller from her cell phone number, there was no evidence introduced at the suppression hearing that the caller had been, or could have been, identified. According to the court, the caller was "an anonymous informant."

Bowen arrived at the apartment complex in a marked patrol unit about four minutes after he received the call. As he entered the driveway going southbound, a red sedan was being driven northbound out of the driveway. When asked how he got the sedan to stop, Bowen testified: "I don't recall if my lights were on or not, but I did make contact with the driver. [¶] ... [¶] ... I most likely indicated that I needed to—to talk with him. I don't know if I ordered him to stop or if my lights were on at that point.... [¶] ... [¶] ... My vehicle was next to him facing the opposite direction. I most likely had my spotlight on the vehicle." Bowen pulled just past the driver's door of the red sedan, stopped, and exited his vehicle.

Bowen saw a male driving the car and a female in the front passenger seat. The female was crying. Bowen did not notice any marks on her. He informed the driver that he had been called to the location in reference to a disturbance. Upon inquiring whether the occupants of the car were having a fight, the driver stated that they were having an argument.

Bowen had the driver step out of the car and *166 patted him down for weapons; none were found. On cross-examination, when questioned as to why he asked defendant to get out of the car, Bowen stated: "I was there to investigate a threat of life, and for officer safety protection[,] and to fully investigate, I would need to talk to the driver."

Defendant was subsequently placed in the backseat of Bowen's patrol car. Bowen questioned Mrs. Rodgers, who gave consent to search the car. The search yielded a gun and ammunition in the sedan's trunk.

B. *Analysis of Stop and Detention*

Defendant contends that the trial court erred in denying his motion to suppress evidence. Relying primarily on *Florida v. J.L.* (2000) 529 U.S. 266 [120 S.Ct. 1375, 146 L.Ed.2d 254] (*J.L.*), defendant argues that Bowen, acting on an anonymous tip, did not have a justifiable basis for the initial stop of the defendant's car prior to Bowen's observation of the occupants of the car.[FN2] He contends that the anonymous tip received by dispatch and communicated to Bowen was not sufficiently corroborated prior to the stop so as to provide a "reasonable suspicion" to stop and detain defendant. He asserts that the stop violated the Fourth Amendment and, therefore, all subsequently seized evidence should have been suppressed. (See, e.g., *Wong Sun v. United States* (1963) 371 U.S. 471, 484 [83 S.Ct. 407, 9 L.Ed.2d 441].)

> FN2. Defendant does not challenge the actions the police took after Bowen observed that the occupants of the car were a Black male and a Black female, and that the female was crying, except to the extent that these actions followed the initial, allegedly unjustified, stop.

The Fourth Amendment protects against " *unreasonable* searches and seizures." (*United States v. Sharpe* (1985) 470 U.S. 675, 682 [105 S.Ct. 1568, 84 L.Ed.2d 605].) An investigatory stop of a motor vehicle implicates the Fourth Amendment "even though the purpose of the stop is limited and the resulting detention quite brief. [Citations.] The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order ' "to safeguard the privacy and security of individuals against arbitrary invasions...." ' [Citation.] Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." (*Delaware v. Prouse* (1979) 440 U.S. 648, 653–654 [99 S.Ct. 1391, 59 L.Ed.2d 660]; see also *United States v. Terry–Crespo* (9th Cir.2004) 356 F.3d 1170, 1176.) Whether law enforcement conduct is reasonable depends upon the totality of the circumstances surrounding the search and seizure. (*United States v. Drayton* (2002) 536 U.S. 194, 207 [122 S.Ct. 2105, 153 L.Ed.2d 242]; *People v. Reyes* (1998) 19 Cal.4th 743, 750, 80 Cal.Rptr.2d 734, 968 P.2d 445.)

In reviewing a trial court's ruling on a motion to suppress evidence, "[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362, 45 Cal.Rptr.2d 425, 902 P.2d 729.)

In *J.L.*, the Supreme Court held that an uncorroborated anonymous tip alleging the illegal possession of a firearm, lacking moderate indicia of reliability, will not justifya stop and frisk by police. (*J.L., supra*, 529 U.S. at p. 274.) There, police received an anonymous call which reported that a young Black male wearing a plaid shirt was at a particular bus stop and that he was carrying a gun. From the record before the court, nothing was known about the informant. Officers arrived at the bus stop about six minutes later. The officers observed three Black males, one wearing a plaid shirt. "Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct." (*Id.* at p. 268, 120 S.Ct. 1375.) One of the officers approached J.L.—the male wearing the plaid shirt—and told him to put his hands up on the bus stop. A frisk yielded a gun in J.L.'s pocket. He was subsequently charged with carrying a concealed weapon and possessing a firearm while under the age of 18. (*Id.* at pp. 268–269.)

In affirming the state court's suppression of the gun, the Supreme Court stated: "In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, [citation] 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity' [citation]." (*J.L., supra*, 529 U.S. at p. 270.) The court recognized, however, that "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' [Citation.]" (*Ibid.*)

The State of Florida argued that the tipster's accurate description of the location and the defendant's clothes provided sufficient indicia of reliability. The court disagreed, stating: "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." (*J.L., supra*, 529 U.S. at p. 272.)

In discussing the need for corroboration, the *J.L.* court distinguished *Alabama v. White* (1990) 496 U.S. 325 [110 S.Ct. 2412, 110 L.Ed.2d 301] (*White*), which upheld a stop and detention following an anonymous tip. In White, an anonymous informant told police that a woman carrying cocaine would leave an apartment building at a specific time and drive a described vehicle to a named motel. (*Id.* at p. 327.) The police saw a woman leave the apartment building and enter a vehicle matching the informant's description, which then drove straight to the named motel. (*Ibid.*) The *J.L.* court explained that in *White*, after the officers observed that the informant had accurately predicted the woman's movements, "it bec[a]me reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine." (*J.L., supra*, 529 U.S. at p. 27.) In *J.L.*, by contrast, "[t]he tip ... lacked the moderate indicia of reliability present in White and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's

knowledge or credibility.... All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." (*Id.* at p. 271.)

In his concurring opinion, Justice Kennedy further addressed the need for indicia of reliability for anonymous tips. "If the telephone call is truly anonymous," he noted, "the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable." (*J.L., supra*, 529 U.S. at p. 275 (conc. opn. of Kennedy, J.).) While the predictive information provided by a tipster, such as in White, was one means of corroborating a tip, Justice Kennedy pointed out that "there are many indicia of reliability respecting anonymous tips...." (*J.L., supra*, at p. 274.) He explained further, "a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action." (*Id.* at p. 275.) In *J.L.*, however, there were no such features. (*Id.* at pp. 275–276.)

Here, Bowen observed a red car at the location identified by the tipster. Although Bowen had not, at that point, observed any criminal activity, the fact that the caller correctly identified the location of the red car and overheard the man's threatening words indicates that the anonymous caller was close enough to have first-hand knowledge of the reported criminal conduct just prior to the officer's arrival. This is a feature that "narrow[s] the likely class of informants" to someone in or near the parking lot (*J.L., supra*, 529 U.S. at p. 275 (conc. opn. of Kennedy, J.)), and

"demonstrates the informant's basis of knowledge or veracity" (*id.* at p. 270; see also *Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 941 [the caller's information demonstrated that he had been an eye witness to the accused's unlawful activity].) Moreover, the short time interval between the tip and the officer's appearance on the scene supports the reliability of the tip. (See *United States v. Wheat* (8th Cir.2001) 278 F.3d 722, 731 (*Wheat*).) These facts provide some foundation as to the tipster's credibility and reduces the "risk of fabrication." (*J.L., supra*, at p. 275. (conc. opn. of Kennedy, J.).) Nevertheless, such facts indicate little more than the tip that was at issue in *J.L.* As we explain, however, *J.L.* is distinguishable because, unlike the possessor of the gun in *J.L.*, the alleged wrongdoer here had threatened to shoot and kill someone and was apparently leaving the scene in a moving vehicle.

Significantly, the facts in *J.L.* did not present an ongoing emergency situation or any immediate endangerment to life. According to the tip, the boy in the plaid shirt was allegedly carrying a gun; there was no allegation that he had threatened to kill someone or otherwise presented an imminent danger to anyone. The *J.L.* court stated that it would not "speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability." (*J.L., supra*, 529 U.S. at p. 273.)[FN3]

> FN3. Similarly, two published California Court of Appeal decisions that relied upon J.L. to reverse trial court orders denying motions to suppress did not involve any exigent circumstances. (See *People v. Jordan* (2004) 121 Cal.App.4th 544; *People v. Saldana* (2002) 101 Cal.App.4th 170.) In both cases, the courts found the facts presented to be essentially

indistinguishable from *J.L.* (*Jordan, supra*, at p. 562; *Saldana, supra*, at p. 175.)

In *United States v. Holloway* (11th Cir.2002) 290 F.3d 1331 (*Holloway*), the court was faced with the kind of dangerous allegations by an anonymous tipster the *J.L.* court declined to "speculate about." In *Holloway*, an anonymous 911 caller reported gunshots and arguing emanating from a certain residence. (*Id.* at p. 1332.) Two officers arrived at the residence shortly afterward and observed the appellant and his wife on the front porch of the home. (*Ibid.*) There is nothing in the description of the facts that indicates the police observed the couple arguing or other activity that would confirm the tipster's information. Nevertheless, upon arriving, one officer illuminated the house with his headlights and spotlight, drew his service weapon, and instructed the couple to raise their hands into view. (*Ibid.*) Defendant complied, but his wife did not. (*Ibid.*) The officer threatened to use pepper spray against the wife. Eventually, another officer placed the wife under his control. (*Id.* at pp. 1332–1333.) After placing defendant into his patrol car, the officer noticed a shotgun and shotgun shells near where defendant had been standing when the police arrived. (*Id.* at p. 1333.) After the defendant was indicted for possession of a firearm by a convicted felon, he moved to suppress the shotgun and other evidence.

Rejecting the appellant's reliance on *J.L.*, the *Holloway* court stated: "A crucial distinction between *J.L.* and this case is the fact that the investigatory stop in *J.L.* was not based on an emergency situation.... [W]hen an emergency is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the

caller." (*Holloway, supra*, 290 F.3d at pp. 1338–1339.) The court further explained: "Once presented with an emergency situation, the police must act quickly, based on hurried and incomplete information. Their actions, therefore, should be evaluated 'by reference to the circumstances then confronting the officer, including the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences.' [Citation.]" (*Id.* at p. 1339.)

The *Holloway* court found that the seizure and subsequent search of the residence was lawful: "[T]he warrantless search of Appellant's residence was based largely on information provided by an anonymous caller. However, the information given by the caller involved a serious threat to human life. Furthermore, the information concerned an on-going emergency requiring immediate action. In light of the nature of the 911 call, a lesser showing of reliability than demanded in *J.L.* was appropriate in order to justify the search of Appellant's home. Because the police had no reason to doubt the veracity of the 911 call, particularly in light of the personal observations of the officers once they arrived on the scene, their warrantless search for victims was constitutional." (*Holloway, supra*, 290 F.3d at p. 1339, fn. omitted.) As for the initial actions taken to obtain control over the defendant and his wife upon their arrival, the anonymous reports of gunshots gave the officers "reasonable cause to believe they were entering a volatile and potentially dangerous situation." (*Id.* at p. 1340.) Their actions to "temporarily secure[ ]" the individuals were therefore justified. (*Id.* at pp. 1340–1341.)

A dangerous situation also distinguished *J.L.* from the facts in People v. Coulombe (2000) 86 Cal.App.4th 52. There, two unidentified citizens, 5 to

10 seconds apart, approached deputies about 11:00 p.m. on New Year's Eve; each indicated that a man wearing a white hat had a gun in a nearby restaurant. The deputies approached the location and observed a man in a white hat seated in a wheelchair. Both deputies approached simultaneously. One of them explained why they were there. About this time, the man in the white hat reached toward his pant's side pocket. A deputy placed his hand over the man's hand, and extracted a small revolver from his pocket. The trial court granted defendant's motion to suppress based on *J.L.* (*People v. Coulombe, supra*, at pp. 54–55, 102 Cal.Rptr.2d 798.) The appellate court reversed. In distinguishing *J.L.*, the court stated: "The circumstances under which defendant was alleged to possess a firearm were markedly different than those in [*J.L.*]—the possession occurred not at a bus stop with only two of the suspect's friends present, but rather in a throng of thousands of New Year's Eve celebrants. The danger presented was thus much increased." (*People v. Coulombe, supra*, at p. 58, 102 Cal.Rptr.2d 798.) Under these circumstances, the situation was "sufficiently dangerous so as to require less reliability than that required in [*J.L.*]." (*Id.* at p. 59.)[FN4]

FN4. We note that the California Supreme Court has granted review of *People v. Wells* (2004) 122 Cal.App.4th 155, review granted December 15, 2004, S128640, and *People v. Dolly* (2005) 128 Cal.App.4th 1354, review granted August 10, 2005, S134505. The *People v. Wells, supra*, case presents the following issue: "Does an anonymous tip that a driver of a motor vehicle appears to be driving under the influence afford reasonable suspicion to support a police officer's stopping of the vehicle, where the information given by

> the anonymous informant cannot be corroborated except as to facts (e.g., the description of the vehicle at the designated location) that do not themselves point to any criminal activity?" (Supreme Court Summary of Cases Accepted During the Week of Dec. 13, 2004.) In *People v. Dolly, supra*, the issue presented for review is whether "an anonymous tip to police that a specific suspect possesses a gun [can] provide reasonable suspicion for a felony stop, where the police corroborate the innocent details of the tip, but do not corroborate the assertion of illegality." (Supreme Court Summary of Cases Accepted During the Week of Aug. 8, 2005.)

The applicability of *J.L.* to a situation involving a moving vehicle was addressed in *Wheat, supra*, 278 F.3d 722. Wheat involved an anonymous cell phone call to police about the dangerous operation of a vehicle and an investigatory stop by an officer who did not observe any erratic driving or unlawful activity. (*Id.* at p. 729.) The Wheat court distinguished the gun possession situation presented in *J.L.* from its facts, explaining: "An erratic and possibly drunk driver poses an imminent threat to public safety. [Citation.] Of course, arguably so too does a citizen armed with a gun, yet the Supreme Court firmly declined to adopt an automatic firearm exception to the reliability requirement on that basis. *J.L.*, [*supra*,] 529 U.S. at [page] 272. However, there is a critical distinction between gun possession cases and potential drunk driving cases. In the possessory offense cases, law enforcement officers have two less invasive options not available to officers responding to a tip about a drunk driver. First, they may initiate a simple consensual encounter, for which no articulable suspicion is required. [Citation.] Needless

to say, that is not possible when the suspect is driving a moving vehicle. [¶] Alternatively, officers responding to a tip about a possessory violation may quietly observe the suspect for a considerable length of time, watching for other indications of incipient criminality that would give them reasonable suspicion to make an investigatory stop.... By contrast, where an anonymous tip alleges erratic and possibly drunk driving, a responding officer faces a stark choice.... [H]e can intercept the vehicle immediately and ascertain whether its driver is operating under the influence of drugs or alcohol. [Citation.] Or he can follow and observe, with three possible outcomes: the suspect drives without incident for several miles; the suspect drifts harmlessly onto the shoulder, providing corroboration of the tip and probable cause for an arrest; or the suspect veers into oncoming traffic, or fails to stop at a light, or otherwise causes a sudden and potentially devastating accident. [Citation.] In contradistinction to *J.L.*, where the suspect was merely standing at the bus stop, in this context the suspect is extremely mobile, and potentially highly dangerous. [Citation.] Thus, we think that there is a substantial government interest in effecting a stop as quickly as possible." (*Wheat, supra*, 278 F.3d at pp. 736–737, fn. omitted.)[FN5]

> FN5. *Wheat* was recently followed by the Second District Court of Appeal in *Lowry v. Gutierrez, supra*, 129 Cal.App.4th at pp. 936–941.

The present case is distinguishable from *J.L.* for reasons similar to those in *Holloway*, *People v. Coulombe*, and *Wheat*. Like the possible drunk driver in *Wheat*, the suspect here was "extremely mobile, and potentially highly dangerous." (*Wheat, supra*,

278 F.3d at pp. 737.) Like the officer in *Holloway*, *Bowen* had no reason to doubt the veracity of the tipster (who had correctly described the location of the red sedan and was within earshot of the alleged threats) and could reasonably believe he was "entering a volatile and potentially dangerous situation." (*Holloway, supra*, 290 F.3d at p. 1340.) Not only was the situation potentially far more dangerous than the situation in *J.L.*, but Bowen could not engage in a consensual encounter with the suspect prior to the stop—an option that was available to the police in *J.L.*

Bowen, like an officer responding to a tip about erratic driving, "face[d] a stark choice" as he pulled up to the moving red sedan. He could stop the vehicle long enough to determine whether there were facts corroborating the tipster's report of criminal activity; or he could decline to stop the vehicle, allowing it to proceed out of the parking lot. If Bowen had not stopped the vehicle, the driver may well have carried out the alleged threat once he was safely away from the police. The danger presented by the tipster's report and the fact that the potential perpetrator was then driving the vehicle away from the scene not only distinguishes the present case from J.L. but gives rise to a strong governmental interest in effecting an investigatory stop of the vehicle. Further distinguishing this case from *J.L.*, the brief stop of defendant's vehicle and observation of the occupants in this case was less of an interference with defendant's Fourth Amendment interests than the frisk on the public street that was at issue in *J.L.*

In sum, the exigent circumstances here distinguish this case from *J.L.* The government's interest in effecting a brief investigatory stop outweighed the intrusion on the defendant's Fourth Amendment interest. Based upon our review of the

totality of the circumstances presented at the suppression hearing, we conclude that Bowen was justified in making the initial stop to determine whether additional facts existed to further corroborate the anonymous caller's tip that defendant was involved in criminal conduct that posed an imminent threat to safety. Accordingly, the motion to suppress evidence was properly denied.

III. SUMMARY OF FACTS PERTAINING TO REMAINING ISSUES

Witness Sandra Rodriguez testified at 1rial that she was awakened in the early morning of July 15, 2001, by sounds of arguing and screaming coming from the parking lot of the Garden Estates Apartments near her house. She looked through her window and saw a Black man and a Black woman outside of a small red car in the parking lot. The man was yelling at the woman, calling her a prostitute and saying he was going to kill her. He hit the woman in the head with his fist. The man told the woman, "[g]ive me the fucking gun." The woman retrieved a gun from the car and gave it to the man. He put the gun to the temple area of the woman's head and said he was going to kill her. The woman was "crying strongly."

Rodriguez's 11-year-old daughter testified that she also heard the argument outside her window. She saw a man and woman next to a red car in the parking lot. The man was pointing a gun at the temple area of the woman's head and telling her he was going to kill her. The woman was crying.

Rodriquez called 911 on her cell phone, but hung up. A 911 operator called her back on her cell phone. While she was on the phone, she saw the police pass by and she told the operator to tell the police to "come back" and to go into the entrance to

the apartments. As she was talking with the 911 operator, she saw the police make contact with the couple outside the red car. While she was certain that the police had made contact with the man she had seen arguing and holding the gun, she could identify the man only as "almost six feet" and Black.

Bowen responded to the call from dispatch at approximately 3:41 a.m. He was told that a male and female were in a red sedan in the parking area of the Garden Estates Apartments. The dispatcher told Bowen that the caller stated she bad heard the male say he was going to shoot and kill the female. Bowen was not told that the caller saw a gun.

As Bowen entered the driveway of the apartment complex going south bound, a red sedan was heading northbound out of the driveway. When the two cars came close to each other, Bowen shined his spotlight into the vehicle. Defendant was driving the car and a woman was in the passenger seat. The woman was defendant's wife, Joyce Rodgers. When the defendant's car stopped, Bowen got out of his car and approached. Mrs. Rodgers was visibly shaken, upset, and crying. Upon inquiring whether they were having a fight, defendant stated that they were having an argument over financial problems. Mrs. Rodgers told Bowen she was upset because they had been arguing, but that defendant had not threatened or assaulted her.

Deputy Nathan Padilla responded to the scene to provide backup for Bowen. Padilla observed several cuts on both sides of Mrs. Rodgers's shoulders, with fresh blood. The injuries appeared to be gouge marks from nails as if somebody was attempting to restrain her around the shoulders. Mrs. Rodgers told Padilla that she and defendant had been arguing about finances and marital problems. The stop and detention ultimately led to a search of

the couple's car, wherein a gun and ammunition were found in the trunk.

Defendant represented himself at trial. He called five witnesses, including himself. Susan Hinkle testified that she was an investigator who had interviewed Rodriguez. Rodriquez told her that she saw a man with a gun in his hand holding a woman by the neck, and that they were about 100 feet away and she would not be able to recognize the man. Michael Robitzer worked for a private investigator for Rodgers, and testified as to photographs taken of Mrs. Rodgers. James Potts, a forensic technician with the county analyzed the .357..caliber rounds found in defendant's car for fingerprints. He found no lat prints on the rounds. Barbara Lang was the dispatcher who received the 911 call. The caller told Lang that she did not see any weapons. The dispatcher had the woman stay on the line so that the deputies could confirm they were at the correct place.

Defendant testified that he and his wife lived about four blocks from where the incident took place. Mrs. Rodgers, who works at Cheers in Moreno Valley, picked him up about 11:00 p.m., after she got off work. They then went out partying at a club called "Metro." They left the club about 2:00 to.2:30 a.m. and went to a friend's home at the Garden Estates Apartments. They were in the parking lot for about one-half hour or 45 minutes. Also in the parking lot was a gray car and a red car; other Black males and females were present. He and his wife were not fighting or arguing; indeed, they were "very romantically inclined" at the time. At some point, they saw that the other cars had left and that there were "police cars... zooming around." They had just begun to leave when Bowen pulled next to his car. When the two looked at each other, he stopped.

Bowen told him that he was investigating a threat of violence. After asking him some questions, the officer placed him in the backseat of the police unit. The deputy then took a plastic bag out of the police car. It contained a dark object. The deputy then went to the defendant's vehicle, popped the trunk open, and came out of the trunk with the bag that had had previously been in the police vehicle. After he pulled out the bag, he laid the contents on the trunk.

IV. ANALYSIS OF REMAINING ISSUES

A. *Motion for a Lineup*

Prior to trial, defendant filed a motion to be placed in a lineup before witnesses. According to defendant, "[t]he purpose of the line-up motion was not to challenge Deputy Bowen's identification of [defendant] as the driver of the red sedan that he pulled over. The purpose of the line-up motion was to examine Rodriguez'[s] ability to identify [defendant] as the [B]lack me in the parking lot, who she claimed assaulted a [B]lack female with a firearm." The court denied the motion. Defendant contends the denial constitutes an abuse of discretion. We disagree.

In *Evans v. Superior Court* (1974) 11 Cal.3d 617, the court held that "due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Id.* at p. 625.) Here, the record fails to demonstrate either that the eyewitness identification by Rodriguez was a material issue or that there was any evidence to suggest a reasonable

likelihood of a mistaken identification by Rodriguez that could be resolved by a lineup.

In his motion, defendant relied upon evidence that Rodriguez slept through some of the arguing that occurred in the parking lot and that she viewed the incident "from a distance between [2:00] [and] [3:00] a.m." It is clear from our review of the entire record that whether Rodriguez could identify defendant as the man in the parking lot was not an issue in the case. Rodriquez testified before the jury that she lived in a house at 5598 Tilton Avenue. She was asleep when she heard persons arguing. She looked through the window and saw a man and a woman outside of a red car. The red car was small. Rodriquez testified that she called the police on her cell phone and then hung up. She got a call backfrom911. As she was on the phone with 911, she saw the police pass by and she told them to come back because they had passed the place. She saw the police make contact with the people in the red car. She is sure the individuals that the police stopped were the persons in the red car, because she was on the phone giving the police directions until they made contact with the red car. Bowen testified that he responded to a call at approximately 3:41 a.m. He was dispatched to a parking area of the Garden Estates Apartments located at 5618 Tilton Avenue. He stopped a red car and made contact with the defendant, who Bowen identified at trial.

In that Bowen identified defendant in court as the individual he contacted in the driveway area of the apartment complex, and Rodriquez had the red car and its occupants within her view up to and including Bowen's contact with them, an *Evan's* lineup would have been useless. Identification of defendant was simply not a material issue.

While Rodriquez did testify on redirect that she was 100 percent sure that the defendant was the man that she saw that night, she previously testified that she would be unable to identify the individuals that she observed by the red car, save and except that they were Black. If she were to see the man among other persons, she would be unable to identify him; and she does recall telling an investigator that she would not be able to identify the individual she observed. Her role in the identification of defendant was limited to testifying that she saw the deputies make contact with the person that had threatened the woman. The identification of defendant as the perpetrator was completed by Bowen, who testified that the person he made contact with in the parking lot was defendant. Whether *Rodriguez* could make out the physical features. of the person in the parking lot was immaterial so long as she could see that the same person who threatened the woman-however imprecisely perceived-was the same person that Bowen contacted in the parking lot. Asking her to identify the defendant in a lineup would, therefore, have served no purpose. Based on this record, there was no error in denying defendant's motion for a pretrial lineup.

B. *Admonishment During Juror Voir Dire*

During voir dire, defendant asked a prospective juror: "If Iwere to testify and you found out that the defendant had a criminal record, would that affect your--." The court cut the question short, stating: "No, Mr. Rodgers. You can't give the jury a situation in which they might in fact encounter and ask them to prejudge the evidence." Defendant argues that this deprived him of his Sixth Amendment right to an impartial jury. Because defendant's failure to object

has prevented effective appellate review, we hold that he has forfeited this issue on appeal.

"'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the [C]onstitution.' [Citation.] 'Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able to impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" (*People v. Earp* (1999) 20 Cal.4th 826, 852.) "[T]he scope of the inquiry permitted during voir dire is committed to the discretion of the court Absent a timely objection to questions that arguably exceed the proper scope, any claim of abuse of discretion is deemed to have been waived." (*People v. Visciotti* (1992) 2 Cal.4th 1, 48, fu. omitted.) "The trial court's exercise of its discretion in the manner in which voir dire is conducted ... shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the Califorirla Constitution." (Code Civ. Proc., § 223.)

Initially, we note that it is not entirely clear what defendant would have asked if he had finished his question. It appears from the portion of the question shown in the record that defendant was merely attempting to elicit whether the prospective juror would be biased against him because of his "criminal record." Determining bias, of course, is a proper aim of juror voir dire. (*People v. Earp, supra*, 20 Cal. 4th at p. 852; see also Code Civ. Proc., § 223 [voir dire in criminal cases is conducted "only in aid of the exercise of challenges for cause"].) However, the defendant might have been, as the trial court

indicated, asking the prospective juror to prejudge evidence that he had been previously convicted. If so, the trial court properly disallowed the question. '(See *People v. Riel* (2000) 22 Cal.4th 1153, 1178.) Here reasonable minds could differ.

Defendant did not object to the court's admonition, ask to be heard, rephrase his question or otherwise attempt to make a record concerning the scope of his question. Because of this failure, the trial court was not afforded the opportunity to correct what may have been an erroneous ruling. Additionally, on the record before us, it is impossible for the reviewing court to determine whether the question would or would not have concluded in an objectionable manner. Any claimed error is therefore waived.

Defendant relies on *People v. Chapman* (1993) 15 Cal.App.4th 136, for the proposition that precluding a defendant from probing prospective jurors as to prejudices against individuals convicted of felonies prevents the defendant from being tried by a fair and impartial jury. *Chapman* is not on point. There, the trial court stated it would not allow any questions concerning prejudice jurors might have toward the defendant because of his felony conviction. (*Id.* at p. 140.) As explained above, because of the inadequate record on the matter before us, it is not clear that defendant was denied the opportunity to inquire as to juror prejudice even as to the one question be did not finish. Even if that question was erroneously disallowed, the court did not preclude defendant from inquiring into the area generally. It is evident from the court's comments that the court perceived the question as seeking from the prospective juror an opinion on, or a prejudgment of, certain evidence; the court was not prohibiting any or all inquiry on the question of prejudice

because of defendant's prior convictions. Furthermore, defendant, after being rebuffed once, moved on. He did not attempt to reenter the area, taking into consideration the court's legitimate concern.

C. *Boyldn-Tahl*[FN6] *Waivers Concerning the Prison Priors*

FN6. *Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct 1709, 23 L.Ed.2d 274] (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 12 (*Tahl*).

In counts 2 and 3 of the information, defendant was charged with being a felon in possession of a firearm having suffered a prior felony conviction, and being in possession of ammunition while prohibited from possessing a firearm because of a prior felony conviction. (See§§ 12021, subd. (a)(1) & 12316, subd. (b)(1).) The People further alleged two enhancements based upon prior prison terms and defendant's failure to remain free from custody for a period of five years. (See§ 667.5, subd. (b).)

Prior to trial, defendant admitted two prior convictions. Defendant contends that he was never specifically advised of his constitutional rights concerning self-incrimination, confrontation, and jury trial with regard to the effect of his admissions on the s ctio667.5, subdivision (b), sentence enhancements. (*See In re Yurko* (1974) 10 Cal.3d 857, 863-864; *Boykin, supra*, 395 U.S. at p. 243; *Tahl, supra*, 1 Cal.3d at p. 132.) While we agree with defendant's characterization of the record, we find that the error does not require reversal, because the record demonstrates that the admissions were made voluntarily and intelligently. (See *People v. Mosby*

(2004) 33 Ca1.4th 353, 361; *People v. Howard* (1992) 1 Cal.4th 1132, 1178.)

Defendant filed a "motion in limine" stating that he intended "to stipulate to his priors" because evidence of his convictions will only unnecessarily inflame and prejudice the jury against the defendant" At a hearing prior to trial, the following colloquy occurred:

> "THE COURT: [Defendant] had written something some time ago indicating that he intended to admit the prison priors; is that correct?
>
> "[DEFENDANT]: That's correct, Your Honor.
>
> "THE COURT: Okay. And we also have-you have two prison priors alleged, then, in [c]ounts [3] and [4]-[2] and [3]?
>
> "[PROSECUTOR]: Yes, correct.
>
> "THE COURT: [Two] and [3]. It's alleged that you suffered prior felony convictions making you a person who can't possess a gun or ammunition. How did you want to handle those?
>
> "[DEFENDANT]: Stipulate to that, Your honor.
>
> "THE COURT: Okay. So -
>
> "[PROSECUTOR]: I think that pretty much takes care of it"

The court thereafter received "admissions" from the defendant as to the underlying prior felonies alleged in counts 2 and 3. The court then turned to the section 667.5, subdivision (b), enhancements:

> "THE COURT: Okay. Then we have the prior offenses. One of them is alleged that on June 9th of 1983, and again Ohio, and Cuyahoga County, you were convicted of

> the crime of kidnapping and you served a term in state prison and did not remain free of custody for five years thereafter, within the meaning of ... [s]ection 667.5. That's you first prior, is that true.
>
> "[DEFENDANT]: That's correct, Your Honor.
>
> "THE COURT: The second one is January 4th-January 9th, 1984, in Superior Court ..., State of Arizona, County of Maricopa. You were convicted of receiving the earnings of a prostitute, a felony, served a term in state prison, didn't remain free of custody for five years thereafter, again within the meaning of .. :[s]ection 667.5, is that also true ... ?
>
> "[DEFENDANT]: That's correct, Your Honor."

Prior to taking defendant's admissions of the section 667.5, subdivision (b), enhancements, the record demonstrates that the court did not advise nor obtain an express waiver of defendant's *Boykin-Tahl* rights, contrary to *In re Yurko, supra,* 10 Cal.3d at pp. 863-864. This error, however, does not require automatic reversal. (*See People v. Howard, supra,* 1 Cal.4th at p.1178.) "[I]f the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission ... was intelligent and voluntary in light of the totality of circumstances." (*People v. Mosby, supra,* 33 Ca1.4th atp. 361.)

Here; the record as a whole demonstrates that prior to admitting the truth of the section 667.5, subdivision (b), enhancements, defendant understood each of his *Boykin-Tahl* rights. Defendant represented himself. He voir dired prospective jurors and cross- examined witnesses called by the

prosecution. During defendant's case-in-chief, not only did he testify, but he called several witnesses to testify on his behalf. Prior to trial, defendant filed approximately 23 written motions. Among them were motions to proceed in propria persona, suppress evidence, appoint an investigator; set aside the information, strike certain counts, appoint counsel for witness Joyce Rodgers, compel discovery, and conduct a pretrial lineup. Each was prepared by the defendant. Immediately prior to jury selection defendant stipulated to the alleged prior felonies, so that the jury would not be inflamed and prejudiced against him. Within the motion he stated, "[d]efendant will not be testifying and intend so stipulate to his priors." (Underlining omitted.)

From an examination of the entire record, it is apparent that defendant understood his rights to a jury trial, be represented by counsel, confront witnesses against him, and testify on his own behalf, as well as the right against self-incrimination. Based upon the totality of the circumstances, we conclude that defendant's admissions of his prior convictions as to the section 667.5, subdivision (b), enhancements was made knowingly, intelligently, and voluntarily.

D. *Substantial Evidence of Sustained Fear for Purposes of Making Criminal Threats*

Defendant contends there was insufficient evidence to support his conviction of count 4, making criminal threats under section 422.[FN7] More specifically, he argues that the evidence does not support the allegations that the victim was "reasonably ...in sustained fear for her own safety. We disagree.

> FN7. Section 422 provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily

> injury to another person, with the specific intent that the statement, made verbally, writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

In reviewing a claim that the evidence is insufficient to support a conviction; "[w]e review the whole record in a light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "'Reversal on this ground is unwarranted unless it appears "that upon no hypotheses whatever is there sufficient substantial evidence to support [the conviction].'" [Citation.]" (*People v.Gaut* (2002) 95 Cal.App.4tb. 1425, 1430.)

Alleged criminal threats must be judged within their context, taking into consideration the surrounding circumstances. (*People v. Bolin* (1998) 18 Cal.4th 297, 340.) "Section 422 ... requires that the threat be such as to cause a reasonable person to be in sustained fear for his personal safety... The phrase to 'cause [] that person reasonably to be in sustained

fear for his or her own safety' has a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1140.)

Here, ample evidence supports the conclusion that defendant's threats caused the victim to reasonably be in sustained fear. Rodriquez heard defendant call the victim a prostitute and saw him strike her in the head with his fist. Rodriquez also heard the defendant tell the woman, "[g]ive me the fucking gun." After receiving the gun, defendant held it to the victim's head and said, "I am going to kill you, fucking bitch." Throughout this time the victim was crying. Rodriquez's daughter testified that she saw a man pointing a gun at the victim's temple and that the woman was crying. The police arrived about three minutes after Rodriquez called 911. When Bowen approached the car he saw the victim in the front passenger seat "crying, upset, visibly shaken." The evidence surrounding the making of the threat, the nature of the threat, the defendant's contemporaneous conduct, and the reaction of the victim during and after the threat, constitute substantial evidence to support the element of "sustained fear" under section 422.

E. *Failure to Instruct on Juror Unanimity*

During closing argument regarding the charge of assault with a deadly weapon, the prosecutor stated: "But what happened in this particular case? Well, not only did he -- he really actually committed a battery in this particular case, because the gun is actually pressed up against her head. But, yeah, he takes the gun, he points it at her head, threatening to kill her. That's assault with a deadly weapon. He had the gun. He had every opportunity to complete

the act, so i.e., an assault has been committed, with a firearm." Defendant contends that by making this argument the prosecutor asserted two separate factual theories by which the jury could convict him for assault with a deadly weapon. We disagree and conclude that a unanimity instruction was not required.

"When a defendant is charged with a single criminal act but the evidence reveals more than one such act, the prosecution must either select the particular act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt-that defendant committed the same specific criminal act." (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499.) When such an instruction is proper, the court must give it sua sponte. (*People v. Riel, supra*, 22 Cal.4th at p. 1199.)

It appears from our review of the record that the prosecution is not referring to two separate acts of assault or arguing different legal theories, but is pointing to a single event described slightly differently by two witnesses. Rodriguez described only one event: the defendant "put [the gun] to her head here" (indicating her temple) and saying he was going to kill her. The other witness, Rodriguez's daughter, testified that the man was "pointing [the gun] at her head right here" (indicating the temple area of her head) and "saying that he was going to kill her." She could not remember whether the gun was placed against the victim's head. The record therefore appears to support only one act of assault with a deadly weapon, which was described as either *putting the gun to*, or *pointing the gun at*,the temple of the victim's head. Although the prosecutor referred to the gun being "pressed against" the victim's head,

we do not view his argument as suggesting two separate acts of assault.

Even if the evidence suggests more than one act of assault with a gun, the unanimity instruction was still not required. Such an instruction is not required "when the two offenses are so closely connected in time that they form part of one transaction or when the offense consists of a continuous course of conduct" (*People v. Winkle* (1988) 206 Cal.App.3d 822, 826; see also *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) Here, if Rodriguez saw one assault (in which defendant put the gun to the victim's head) and her daughter saw a different assault (in which defendant pointed the gun at the victims' head), it is clear that the two actions occurred close in time and were part of a continuous course of conduct. A unanimity instruction was not required.

Defendant contends, however, that the discrepancy between the two descriptions does not merely reflect minor variations in witness' perceptions, but rather two different crimes. In Rodriguez's description, in which the gun is "put to" the victim's head, a battery has occurred because the gun touched the victim. (See, e.g., *People v. Davis* (1995) 10 Cal.4th 463,541 [battery includes "slightest unlawful touching"];*People v. Rocha* (1971) 3 Cal.3d 893, 899, fn. 12 [the "least touching"].) Defendant pointed at the victim, there was insufficient evidence to provide that the crime of assault with a firearm was committed, because there was no evidence that the gun was loaded. (See, e.g., *People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6.) We reject this contention. Although merely pointing an unloaded gun at another does not necessarily constitute assault, using an unloaded gun as a bludgeon does constitute assault with a firearm. (See ,e.g., *People v. Miceli* (2002) 104 al.App.4th 256, 268, 270.) Here, according

to Rodriguez's daughter, the defendant was pointing the gun at the victim's temple, threatening to kill her. The jury could infer from the reference to the victim's temple in her description that the gun was close enough to the victim to be used as a bludgeon. Moreover, even in the absence of direct evidence that a gun is loaded, a jury is permitted to find that it is loaded from m[t]he acts and language used by an accused person while carrying a gun ....' [Citations.]" (*People v. Rodriguez* (1999) 20 Ca1.4th I; 13.) Here, the defendant told the victim to get a gun from the car after hitting her and threatening her; the victim handed the gun to defendant, who pointed it at the victim's temple and threatened to kill her. Ali the while, the victim is crying. The jury could easily conclude from such facts that the gun was loaded. (See *ibid.*; *People v. Mearse* (1949) 93 Cal.App.2d 834, 836-838; *Peoplev. Montgomery* (1911) 15 Cal.App. 315, 317-319.)

F. *Sixth Amendment Right to Counsel Regarding Motion for New Trial and Sentencing*

Following the return of the jury verdict on June 27, 2003, the following exchange took place between defendant and the court:

> "[DEFENDANT]: Your Honor.
>
> "THE COURT: Yes, Mr. Rodgers?
>
> "[DEFENDANT]: I would like to file a motion for new trial.
>
> "THE COURT: You can do that, sir, when we come back here on the 25th of
>
> July.
>
> "[DEFENDANT]: I would like for you to also appoint Mr. Belter to prepare that
>
> for me. He was my-

"THE COURT: Who?

"[DEFENDANT]: I think his name is Belter. He was my former -he was assigned to represent me at one time, the last one that was assigned.

"THE COURT: We aren't doing anything like that right now, Mr. Rodgers. If you have some request that you want to make a motion for something, expect that you will do that ... ,we will take it up at that time."

On July 16, 2003, defendant filed a "Motion for Appointment of Counsel to File a Motion for a New Trial ...." Substantively, the document states in its entirety:

"Defendant moves this Court to reassign defendant's former counsel Michael Belter to perfect and file defendant's Motion for a New Trial. [Failing that, defendant moves this Court for the production of the trial transcript, whereupon he may have a copy to perfectt [and] file his motion for new trial." (Underlining omitted.) The document did not set forth any reasons in support of the request for counsel.

On July 25, 2003, the court acknowledged receipt of defendant's motion and asked if he wanted "to be heard any further on that" Defendant said he did not. The court denied the motion, stating: "You are not going to get counsel, Mr. Rogers [sic]. You made this election to represent yourself. Everybody tried to talk you out of it at the time. You insisted you wanted to do it. You are doing it. We aren't going to substitute in an attorney at this time." Sentencing was continued to July 30, 2003. In the intervening time, defendant filed a four-page motion for new trial, setting forth seven separate grounds.

Defendant contends that the denial of his motion for appointment of counsel was error. When, as here, a defendant has exercised his right to represent himself at trial and later seeks to have counsel appointed, the court's decision to deny counsel is reviewed for an abuse of discretion. (*People v. Gallego* (1990) 52 Cal.3d 115, 164-165; *Peoplev. Ngaue* (1991) 229 Cal.App.3d 1115, 1126-1127.) In determining whether the court abused its discretion, we consider the "totality- of the facts and circumstances." (*People v. Gallego, supra*, at p. 164.)

In ruling on defendant's motion, the trial court may considerdefendant's prior history in the substitution of counsel, his desire to change from self-representation to counsel-representation, and the reasons given in support of the motion. (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994.)[FN8]

FN8. Other factors include the length and stage of the trial proceedings, the reasonably expected disruption or delay that would ensue from the granting of such motion, and the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. (*People v. Elliott, supra*, 70 Cal.A.pp.3d at pp. 993-994.) In *People v. Smith* (1980) 109 Cal.App.3d 476, the court stated: "While the consideration of all of these criteria is obviously relevant and helpful to a trial court in resolving the issue, they are not absolutes, and in the final analysis it is the totality of the facts and circumstances which the trial court must consider in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation in midtrial." (*Id.* at p. 484, cited with approval in *People v. Gallego, supra*, 52 Cal.3d at p. 164.)

Here, it appears from the record that defendant had switched between representing himself and being represented by counsel at various times throughout the case. From July 2001 until December 2001, defendant represented himself during his arraignment and hearings on various motions that he prepared; for the next few months, he was represented by counsel; in March 2002, the court granted defendant's motion to represent himself; two months later, defendant requested the appointment of counsel, which the court granted; defendant again sought to represent himself in September 2002, but the court rejected the request; and a renewed request was granted in February 2003, after which he represented himself at trial.

Significantly, the subject motion to appoint counsel did not include any facts or reasons to support it "A motion must specify the grounds on which it is made." (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Criminal Procedure § 8, p. 13; cf. *People v.Williams* (1999) 20 Ca1.4tb 119, 130.) Defendant did not explain to the trial court, and offers no justification on appeal, for the failure to set forth any grounds for the motion. The complete absence of any support cannot be attributed to defendant's lack of legal training or the lack of access to a law library. As discussed in part D. above, defendant filed numerous written motions throughout the case, often supported by extensive discussion of facts, argument, and citation to legal authority. Like the defendant in *People v. Gallego, supra*, defendant had, by this time "exhibited considerable knowledge of both trial tactics and trial procedure." '(*People v. Gallego, supra*, 52 Cal.3d at p. 164.) Nor can the motion's deficiencies or brevity be the result of insufficient preparation time. Defendant indicated his desire for counsel immediately following

the verdicts on June 27, 2003, and filed his one-page motion almost three weeks later. Moreover, when asked at the hearing whether he wished to be heard on the motion, he declined to provide any reasons or argument. At the same hearing, defendant discussed his plan for his motion for new trial. He informed the court that he intended to support the new trial motion with an affidavit from the victim, who did not testify at trial. Defendant did not, however, claim he needed counsel to assist him with the affidavit or the motion, telling the court: "I can do the motion myself. I just need time to perfect it."

From our review of the record, it is clear that if there were legitimate reasons for the change from self-representation to counsel-representation, defendant was abundantly capable of expressing one. He nevertheless failed to do so. Because the court was not given any reason to grant the defendant's motion, we cannot find that the court abused its discretion in declining to do so. (Cf. *People v. Jackson* (1980) 28 Cal.3d 264, 287 [summary denial of motion for additional counsel proper when defendant "failed to furnish any specific; compelling reasons], disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn.3.)

Defendant relies upon *Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696, which held that "in the absence of extraordinary circumstances, an accused who requests an attorney at the time of a motion for a new trial is entitled to have one appointed, unless the government can show that the request is made for a bad faith purpose." (*Id.* at p. 701.) This holding has been rejected by the California Court of Appeal in *People v. Ngaue, supra,* 229 Cal.App.3d at page 1124, and rejected as contrary to federal authorities in *United States v. Tajeddini* (1st Cir. 1991) 945 F.2d 458, 469-470, overruled on other grunds in Roe v.

Flores-Ortega (2000) 528 U.S 470, 478 -120 S.Ct. 1029, 145 L.Ed.2d 985]. To the extent *Menefield v. Borg, supra*, has any persuasive weight, it is distinguishable. In that case, unlike here, the accused expressed his reasons for seeking the appointment of counsel. Although the case case does not set forth the details of the grounds for the motion, we are told that the "request concentrated upon the intricacies of the California statute governing new trials. 'I've studied it, [the accused told the trial court,] but I just can't grasp it. I see what they're saying, but I just can't get deep off [sic] into it, like the other studies I did.'" (*Menefield v. Borg, supra*, at p. 697.) Here, by contrast, defendant expressed no difficulty with California's requirements for a new trial motion; indeed, he assured the court that he could "do the motion" himself."

Defendant also contends that he was entitled to have counsel appointed for the sentencing hearing. However, defendant never requested the appointment of counsel for his sentencing hearing. Following his waiver of right to counsel in February 2003, after which he represented himself throughout the trial and thereafter, the only request he made for counsel was his July 16, 2003, motion for counsel which was expressly "to perfect and file defendant's Motion for a New Trial." On appeal, defendant claims this motion "necessarily implied a request to be represented at sentencing. Even if such an implication could be made, the court implicitly denied that request when it denied his express motion for counsel. We affirm this implied denial for the same reasons we affirm the denial of the express motion for counsel.

G. *Sentencing Issues*

The trial court imposed the upper term sentence of four years on count 1, assault with a firearm (§ 245, subd. (a)(2).) In doing so, the court relied upon three aggravating factors: (1) that the crime involved violence and a threat of great bodily harm (see Cal. Rules of Court,ruile 4.42l(a)(1));[FN9] (2) that defendant's prior convictions are numerous and of increasing seriousness (see rule 4.421(b)(2)); and (3) that defendant has served a prior prison term (see rule 4.42l(b)(3)). The court found no mitigating circumstances.[FN10]

> FN9. All further references to rules are to the California Rules of Court.
>
> FN10. At the sentencing hearing, defendant asserted that mitigating factors included that the victim was not injured and that there was no evidence that the gun was loaded. On appeal, defendant does not contend that the court's finding of no mitigating circumstances was erroneous.

The court also imposed an upper term of 10 years for the firearm enhancement under section 12022.5, to be served consecutively. The choice of the upper term was based upon two aggravating factors: (1) defendant was engaged in violent conduct that indicates a serious danger to society (see rule 4.421(b)(l)); and (2) his prior performance on parole was unsatisfactory (see rule 4.42l(b)(5)).

The court further imposed consecutive one-year sentences for each of the allegations that he served a prior prison term and did not remain free of custody for five years. (§ 667.5, subd. (b).)

Defendant contends that the court erred by using defendant's prior prison terms to support the imposition of the upper term on count 1, while imposing consecutive sentences for the

enhancements under section 667.5, subdivision (b). (See § 1170, subd. b) ["The court may not impose an upper term by using the fact of any enhancement upon which sentence is posed under any provision of law"]; rule 4.420(c) [a fact found as an enhancement may be used to support an "upper term only if the court has discretion to strike the punishent for the enhancement and does so"].) Defendant did not object to this alleged "double counting" error at trial and, therefore, forfeited his right to assert it on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 353; *People v. Steele* (2000) 83Cal.App.4th 212, 226.)

Even if the argument was not forfeited, we would reject it. In addition to the fact of the prior prison terms, the court also relied upon two other aggravating factors -the involvement of violence and a threat of great bodily harm and the number and increasing seriousness of defendant's prior convictions. Only one aggravating factor is necessary to support an upper term sentence. (See *People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.)

Defendant contends that the involvement of violence and threat of great bodily harm cannot be used to impose the upper term because "all violations of section 245, subdivision (a)(2), necessarily involve 'violence or threat of great bodily harm.'" (See rule 4.42 (d) ["A fact that is an element of the crime shall not be used to impose the upper term"]) We disagree. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) "Violence;" for purposes of assault is "synonymous with 'physical force.'" (*People v. Whalen* (1954) 124 Cal.App.2d 713, 720.) Because assault is "an attempt to commit a battery" (*People v. Colantuono* (1994) 7 Cal4th 206, 214, italics added), one may commit an assault without

actually striking another or even being "'at any time within striking distance'" of the victim. (1 Witkin &Epstein, Cal.Criminal Law (3d ed. 2000) Crimes Against the Person, § 8, pp. 643-644, quoting *People v. Yslas* (1865) 27 Cal. 630, 633; *People v. McCaffrey* (1953) 118 Cal.App.2d 611, 619.) Here, defendant's actions far exceed a mere assault with a firearm, but included putting the gun to the woman's head, hitting her in the face with his fist, and (the court could have conclude) causing fresh wounds found on the victim's shoulders. The court's conclusion that the assault involved violence or the threat of great bodily injury is thus well supported.

"When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper" (*People v. Price* (1991) 1 Cal.4th 324, 492.) Here, in light of the absence of mitigating factors and the violence involved in the assaults, we conclude that it is not reasonably probable that the court would have imposed a lesser sentence.

Defendant further contends that there is no evidence to support the imposition of the aggravated term for the firearm enhancement under section 12022.5. Here, the court found that defendant is "a serious danger to society" and his prior performance on parole was unsatisfactory. Defendant contends that there is insufficient evidence to support the latter finding. Even if this were so, the conduct of defendant of hitting and threatening to kill his wife at gunpoint provides sufficient evidence from which the court could conclude that defendant was a serious danger to society, an aggravating factor under rule 4.421(b)(1). As with the base term, it is not

reasonably probable that a different sentence would have been imposed if only this factor was considered.

H. *Upper Term Under Blakely*[FN11]

FN11. *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*).

Defendant contends that the imposition of the upper term sentence on count 1 and the related enhancement violates his Sixth Amendment right to a jury trial under *Blakely*. Because our state Supreme Court has recently rejected a similar argument in *People v.Black* (2005) 35 Cal.4th 1238 (*Black*), we reject defendant's argument.

In *Blakely*, the high court reaffirmed the conclusion it had reached in *Apprendi v. New Jersey* (2000) 530 U.S. 466 p20 S.Ct. 2348, 147 L.Ed.2d 435] (Apprendi): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490; *Blakely, supra*, 124 S.Ct. at p. 2536.) The *Blakely* court further stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely, supra* at p. 2537.)

Following the filing of defendant's opening brief, the California Supreme Court decided *Black*. In *Black*, the court expressly addressed the effect of *Blakely* on California's determinate sentencing law and "the specific questions whether a defendant is constitutionally entitled to a jury trial on the aggravating factors that justify an upper term sentence or a consecutive sentence." (*Black, supra*, 35

Cal.4th at p. 1244.) As to the imposition of an upper term under California's determinate sentencing law, the courtstated: "The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. The judicial factfinding that occurs during that selection process is the same type of judicial factfinding that traditionally has been a part of the sentencing process. Therefore, the upper term is the 'maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict....'" (*Id.*at pp. 1257-1258, quoting *Blakely,supra*, 124 S.Ct. at p. 2537.)

Black controls the issues presented by defendant in this case and we are, of course, bound by it. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) Because *Black* holds that the Sixth Amendment does not provide a right to a jury trial as to aggravating factors that justify the imposition of upper term sentences under California's determinate sentencing law, we reject defendant's argument.

V. DISPOSITON

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

APPENDIX F

FILED August 2, 2012

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. EDCV 08-01003-VAP (MLG)

Otis Lee Rodgers v. John Marshall, Warden

Date August 2, 2012

Proceedings: In Chambers: Order Denying Respondent's Application to Extend Execution Date of Conditional Writ [Doc. #107]

I. Background

In an order and judgment entered May 4, 2010, District Judge Virginia A. Phillips adopted my March 19, 2010, Report and Recommendation denying Petitioner Otis Lee Rodgers's petition for writ of habeas corpus. The decision concluded in relevant part that Petitioner's Sixth Amendment rights were not violated when the trial court denied his post-trial request for the appointment of counsel for the purpose of filing a motion for new trial, after Petitioner had previously waived counsel and exercised his right to represent himself at trial. In an opinion dated May 17, 2012, the United States Court of Appeals for Ninth Circuit disagreed, finding that "Rodgers' Sixth Amendment right to counsel was violated when the trial court denied his timely request for representation for a new trial motion based on the notion that once waived, the right to counsel cannot be reasserted." *Rodgers v. Marshall*, 678 F.3d 1149, 1163 (9th Cir. 2012).

Respondent filed a petition for rehearing and petition for rehearing en banc, which were denied by the Ninth Circuit on June 28, 2012. On July 10, 2012, the Ninth Circuit issued its mandate. Following the

issuance of the mandate, on July 19, 2012, Judge Phillips entered an order and judgment granting a conditional writ of habeas corpus and directing that Petitioner be brought before the Riverside County Superior Court within sixty days for the purpose of being appointed counsel for consideration of the filing of a motion for new trial. No petition to stay the mandate has ever been filed in the Ninth Circuit.

On July 27, 2012, Respondent filed an Application to Extend Execution Date of Conditional Writ in this Court. The Application states that Respondent is in the process of seeking permission to file a petition for writ of certiorari in the Supreme Court for review of the Ninth Circuit's judgment and requests that the Court delay the issuance of the conditional writ until the Supreme Court has either granted or denied the certiorari petition. On July 30, 2012, Petitioner filed an Opposition, contending that under Federal Rule of Appellate Procedure 41(d)(2)(A), this Court does not have authority to grant Respondent's Application. For the reasons discussed below, Respondent's application is DENIED.

II. Application to Extend Conditional Writ

By requesting that the execution of the Court's order granting a conditional writ of habeas corpus be postponed, Respondent essentially asks this court to stay the Ninth Circuit's mandate while Respondent seeks review of the decision in the Supreme Court.1 Stays of execution pending Supreme Court review are governed by 28 U.S.C. § 2101(f), which states:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a

> reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted *by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court*, . . .

28 U.S.C. § 2101(f) (emphasis added). Therefore by its language, § 2101(f) confers authority only upon a judge of the Ninth Circuit, or Supreme Court Justice, to issue a stay of a Ninth Circuit judgment while awaiting the outcome of a certiorari petition challenging that judgment.

Similarly, the Federal Rules of Appellate procedure contemplate that a party seeking to stay a mandate while a petition for certiorari is pending will do so in the appellate court issuing the mandate. Fed. R. App. P. 41(d)(2)(A) provides that "A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay." The local Ninth Circuit Rules also imply that the appellate court will address a motion for stay in the first instance, stating that such a motion "will not be granted as a matter of course, but will be denied if the court determines that the petition for certiorari would be frivolous or filed merely for delay." Ninth Circuit Rule 41-1.

There is no Ninth Circuit case law directly addressing whether a district court has jurisdiction to stay a court of appeals decision. *See Sletten v. Navellier Series Fund*, No. 03:00-CV-0167, 2006 WL 2335566 at *1 (D. Nev. Aug. 10, 2006). While neither § 2101(f) nor the Federal Rules of Appellate Procedure explicitly preclude a district court from

issuing such a stay, the great majority of courts considering this

> FN 1 To the extent that Respondent's Application can instead be construed as a request that this Court depart from the Ninth Circuit's mandate, such departure would violate the "mandate rule," which requires an inferior court to obey the mandate of its supervising appellate court. *See United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (stating that when a case has been remanded to the district court, the district court must follow the appellate court's mandate and "cannot vary it, or examine it for any other purpose than execution." (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895)).

issue have concluded that a district court is not permitted to exercise jurisdiction to stay a circuit court's final judgment pending filing or resolution of a petition for writ of certiorari. *See, e.g., In re Stumes*, 681 F.2d 524 (8th Cir. 1982) (per Curiam); *William A. Graham Co. v. Haughey*, 794 F. Supp. 2d 566, 568 (E.D. Penn. 2011); *United States v. Wittig*, No. 02-40140-02, 2008 WL 5119986 (D. Kan. Nov. 25, 2008); *Sletten*, 2006 WL 2335566, at *1; *United States v. Lentz*, 352 F. Supp. 2d 718, 726 (E.D. Va. 2005); *Brinkman v. Dep't of Corr.*, 857 F. Supp. 775, 777 (D. Kan. 1994); *Gander v. FMC Corp.*, 733 F. Supp. 1346, 1347 (E.D. Mo. 1990); *Mister v. Illinois Cent. Gulf R.R. Co.*, 680 F. Supp. 297, 298 (S.D. Ill. 1988); *Hovater v. Equifax Servs., Inc.*, 669 F. Supp. 392, 393 (N.D. Ala. 1987); *Deretich v. St. Francis*, 650 F. Supp. 645, 647 (D. Minn.1986); *Studiengesellschaft Kohle v. Novamont Corp.*, 578 F. Supp. 78, 79-80 (S.D.N.Y. 1983); *but cf. Office Depot Inc. v. Zuccarini*, No. C 06-80356, 2010 WL 1929849 (N.D. Cal. May 12, 2010)

(noting that requests for stay are ordinarily addressed to the court of appeals pursuant to Fed. R. App. P. 41(d), but nevertheless considering and denying plaintiff's request for a stay). These decisions generally note that this approach is consistent with the plain language of § 2101(f), and that as a prudential matter it would not be appropriate for the district court to rule on the likelihood that an appellate court ruling will be accepted for review by the Supreme Court. *See, e.g, Lentz*, 352 F. Supp. 2d at 726.

The Court is persuaded by the reasoning of the cases holding that a district court does not have jurisdiction to stay a mandate of the court of appeals pending a petition for certiorari to the Supreme Court. This approach is consistent with the language of § 2101(f), together with that of Fed. R. App. P. 41(d)(2)(A) and Ninth Circuit Rule 41-1. Any request to stay the mandate in this case must be addressed to a judge of the court of appeals or a justice of the Supreme Court. Accordingly, Respondent's Application is DENIED.

APPENDIX G

FILED July 7, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

EDCV 08-1003-VAP (MLG)

OTIS LEE RODGERS,
Petitioner-Appellant,
v.
JOHN MARSHALL, Warden,
Respondent-Appellee.

APPLICATION TO EXTEND EXECUTION DATE OF CONDITIONAL WRIT; DECLARATION OF DAVID DELGADO-RUCCI

COMES NOW RESPONDENT, John Marshall, Warden, who respectfully requests an extension of the execution date of the conditional writ in the above matter.

The conditional writ directs that Respondent remand the matter to the state trial court to appoint counsel in order to assess whether a motion for new trial should be filed. Respondent is in the process of seeking permission to file a petition for writ of certiorari in the Supreme Court. The petition is due by August 15, 2012. In the interim, the Ninth Circuit denied the Petition for Rehearing and Suggestion for Rehearing en banc on June 28, 2012. The mandate issued on Jul 10, 2012.

For the reasons stated in the attached Declaration of David Delgado-Rucci, Respondent respectfully requests that the date of issuance of the conditional writ be delayed until the Supreme Court has either granted or deny the petition for writ of certiorari. Respondent will promptly inform this Court whether permission was granted to file a petition for writ of certiorari, and if filed, whether the

petition was granted or denied by the Supreme Court.

Opposing counsel, John Ward, opposes this application.

Dated: July 27, 2012

Respectfully submitted,

Kamala D. Harris
Attorney Gneral of California
Kevin Vienna
Supervising Deputy Attorney General

/S/-David Delgado-Rucci
David Delgado-Rucci
Deputy Attorney General
Attorney for Respondent

DECLARATION OF DAVID DELGADO-RUCCI

I, David Delgado-Rucci, declare as follows:

1. I am the deputy attorney general assigned to represent Respondent in the federal habeas corpus proceeding Rodgers v. Marshall, EDCV 08-1003-VAP (MLG), which case was appealed to the Ninth Circuit, case 10-55816;

2. The Ninth Circuit denied the Petition for Rehearing and Suggestion for Rehearing en banc on June 28, 2012. The court issued the mandate in this case on July 10, 2012. Respondent believes that there is 90-day period from the denial of the petition for rehearing in which to file a petition for writ of certiorari in the Supreme Court. That date is September 25, 2012. Respondent is in the process of seeking a petition for writ of certiorari in the Supreme Court. The petition is from a remand to the state court to appoint counsel to determine if a motion for new trial should be filed;

3. Although there is no due date stated as to what time period this Court should issue the conditional writ, or what time frame applies to the state trial court, Respondent assumes this Court will issue the conditional writ prior to or by September 25, 2012;

4. I have communicated with Rodger's counsel, John Ward. Counsel opposes this application.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration is executed this 26th day of July, 2012, at San Diego, California.

/S/-David Delgado-Rucci
DAVID DELGADO-RUCCI
Deputy Attorney General

APPENDIX H

FILED July 19, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA

EDCV 08-1003-VAP (MLG)

OTIS LEE RODGERS,
Petitioner,
v.
JOHN MARSHALL, Warden,
Respondent.

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS FOLLOWING REMAND

This matter is before the court on a Petition for Writ of Habeas Corpus filed pursuant to 28 u.s.c. § 2254, following reversal by the United States Court of Appeals for the Ninth Circuit. *Rodgers v. Marshall*, 678 F.3d 1149, 12 Cal. Daily Op. Serv. 5337 (9th Cir. 2012). In an order and judgment entered May 4, 2010, this Court adopted the March 19, 2010, Report and Recommendation of United States Magistrate Judge Marc L. Goldman, which concluded in relevant part that Petitioner's Sixth Amendment rights were not violated when the trial court denied his post-trial request for the appointment of counsel for the purpose of filing a motion for new trial, after Petitioner had previously waived counsel and exercised his right to represent himself.

On appeal, the Ninth Circuit disagreed, finding that "Rodgers' Sixth Amendment right to counsel was violated when the trial court denied his timely request for representation for a new trial motion

based on the notion that once waived, the right to counsel cannot be reasserted." 12 Cal. Daily Op. Serv. at 5224. The Court further noted that when a habeas petitioner has been denied the right to counsel, the Court "'should put the defendant back in the position he would have been in if the Sixth Amendment violation never occurred.' *Nunes v. Mueller*, 350 F. 3d 1045, 1057 (9th Cir. 2003)." 12 Cal. Daily Op. Serv. at 5225. Accordingly, it is ordered that judgment be entered granting a conditional writ of habeas corpus. Petitioner shall be brought before the Riverside County Superior Court within sixty (60) days of the date of the entry of judgment in this case for the purpose of being appointed counsel for consideration of filing a new trial motion.

Dated: July 18, 2012

_____

Virginia A. Phillips
United States Magistrate Judge

APPENDIX I

FILED July 19, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA

EDCV 08-1003-VAP (MLG)

OTIS LEE RODGERS,
Petitioner,
v.
JOHN MARSHALL, Warden,
Respondent.

JUDGMENT

IT IS ADJUDGED that a conditional writ of habeas corpus be GRANTED. It is further Ordered and Adjudged that Petitioner be brought before the Riverside County Superior Court within sixty (60) days of the date of this judgment for the purpose of being appointed counsel for consideration of filing a new trial motion, or alternatively be discharged from the adverse consequences of the conviction and judgment in this case.

Dated: July 18, 2012

_____
Virginia A. Phillips
United States Magistrate Judge

APPENDIX J

FILED July 10, 2012

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OTIS LEE RODGERS,
Petitioner - Appellant,
v.
JOHN MARSHALL, Warden,
Respondent – Appellee.

No. 10-55816
D.C. No. 5:08-cv-01003-VAP-MLG
U.S. District Court for Central California, Riverside

MANDATE

The judgment of this Court, entered May 17, 2012, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of the Court

Synitha Walker
Deputy Clerk

APPENDIX K

FILED June 28, 2012

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OTIS LEE RODGERS,
Petitioner - Appellant,
v.
JOHN MARSHALL, Warden,
Respondent – Appellee.

No. 10-55816
D.C. No. 5:08-cv-01003-VAP-MLG
U.S. District Court for Central California, Riverside

ORDER

Before: REINHARDT and W. FLETCHER, Circuit Judges, and ZOUHARY, District Judge.*

The panel has voted unanimously to deny the petition for rehearing. Judges
Reinhardt and Fletcher have voted to deny the petition for rehearing en banc, and
Judge Zouhary so recommended.
The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.
The petition for rehearing and the petition for rehearing en banc are **DENIED**. No further petitions for panel or en banc rehearing will be entertained.

*The Honorable Jack Zouhary, District Judge for the U.S. District Court for Northern Ohio, sitting by designation.

APPENDIX L

FILED May 31, 2012

10-55816

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OTIS LEE RODGERS,
Petitioner-Appellant,
v.
JOHN MARSHALL, Warden,
Respondent-Appellee.

On Appeal from the United States District Court for the Central District of California

No. EDCV 08-01003-VAP (MLG)

The Honorable Virginia A. Phillips, Judge

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Respondent, John Marshall, Warden, files this Petition for Rehearing and suggestion for Rehearing En Banc to address this Court's published opinion. The basis for the rehearing is that the court has erred in its analysis concerning United States Supreme Court precedent as to the issue presented and has erred in determining that there is clearly established federal law by relying on its own court precedent.

INTRODUCTION

Petitioner-Appellant Otis Rodgers ("Rodgers") seeks federal habeas corpus relief because the trial court denied his request to terminate self-

representation, which had been granted pursuant *Faretta v. California*, 422 U.S. 806, 807 (1975). Rodgers sought reappointment of counsel only after the jury had returned guilty verdicts, after he had represented himself throughout the trial. The panel concludes that the decisions of the state courts denying Rodgers' claim are unreasonable.

The panel recognized that, to grant relief it had find "established precedent of the United States Supreme Court" and apply it to two different questions: (1) whether the Sixth Amendment right to counsel applied to a post-conviction motion for new trial; and (2) whether Rodgers had a right to revoke an otherwise valid waiver of his right to counsel. Although the Memorandum Opinion (Mem.) acknowledges that no decision of the United States Supreme Court squarely addresses either issue, (Mem. at 5229, 5235), it nevertheless purports to find "clearly established precedent" that the state courts unreasonably applied.

In reaching this conclusion, the Memorandum Opinion makes two related fundamental errors. First, it relies on circuit precedent and precedent from other circuits to transmute general principles from applicable United States Supreme Court cases into much more specific rules. In this regard, the Memorandum Opinion seeks but fails to distinguish the published decision of another panel in *John-Charles v. California*, 646 F.3d 1243 (9th Cir. 2011). In *John-Charles*, the Court determined that "'no Supreme Court authority holds that a defendant has a constitutional right to post-*Faretta* appointment of counsel once trial proceedings have commenced." *Id.* at 1252. Notwithstanding this indisputable observation, the Memorandum Opinion constructs an argument that clearly established Supreme Court precedent *does* require reappointment of counsel

after a valid *Faretta* waiver. The difference between *John-Charles* and *Rodgers* is dramatic; it cannot be harmonized or reconciled.

The conflict between the two decisions arises from a fundamentally different approach to determining the existence of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254. The Court in *John-Charles* correctly perceived that a state court cannot apply Supreme Court precedent unreasonably unless "that precedent is closely on point." *John-Charles*, 646 F.3d at 1248 (citing *Wright v. Van Patten*, 552 U.S. 120, 125 (2008); *Carey v. Musladin*, 549 U.S. 70, 77 (2006). The Memorandum Opinion contradicts this principle, instead turning to existing circuit precedent to find a specific rule requiring reappointment of counsel.[FN1]

> FN1. The Memorandum Opinion acknowledges the conflict with *John-Charles*, but concludes that it is bound by *Robinson v. Ignacio*, despite the "narrower interpretation" of § 2254's "clearly established" requirement deriving from intervening Supreme Court decision. (Mem. at 5238.) Essentially, the Memorandum Opinion rejects the conclusion that binding Supreme Court authority must be "closely on point."

(Mem. at 5235) (citing *Robinson v. Ignacio*, 360 F.3d 1044, 1056 (9th Cir. 2004). But, as explained in *John-Charles*, *Robinson v. Ignacio* was based only on circuit precedent—it could not trace its lineage back to a Supreme Court holding closely on point. *John-Charles*, 646 U.S. at 1251-52. This approach is incorrect. *See Renico v. Lett*, __ U.S. __, 130 S. Ct. 1855 (2010) (holding that the Sixth Circuit erred in relying on circuit precedent in determining what

constituted clearly established law for purposes of § 2254(d)).

More importantly, the opinion in *John-Charles* questions whether the "mode of AEDPA analysis" reflected in *Robinson v. Ignacio* and, now, in *Rodgers* can survive more recent and restrictive decisions from the United States Supreme Court regarding what qualifies as clearly established Federal law. *John-Charles*, 646 F.3d at 1252 (citing *Wright v. Van Patten* and *Carey*, 549 U.S. at 77). Decisions by this Court since *Wright* and *Carey v. Musladin* adopt this more restrictive analysis. *See Moses v. Payne*, 555 F.3d 742, 756-60 (9th Cir. 2009); *see also Crosby v. Schwartz*, --- F.3d ---, 2012 WL 1561032 (9th Cir. 2012) (concluding that no Supreme Court case addressed the right to withdraw from a jury waiver).

Thus, panel rehearing is necessary to more closely examine and resolve, if it can, the conflict with *John-Charles*. Alternatively, Respondent asks for rehearing en banc to resolve the obvious conflict in approaching this issue of great importance. If *John-Charles* is correctly decided, then *Rodgers* cannot be.

The second fundamental flaw in the Memorandum Opinion is that the panel fails to ask "the only question that matters" in cases that arise under 28 U.S.C. § 2253 (AEDPA)—whether fairminded jurists could have agreed with the resolution of the issue by the state court. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). That is, having acknowledged that the relevant pronouncements from the United States Supreme Court provide only the most general of guidelines, the Memorandum Opinion fails completely give the state court the "greater leeway" that applies to the State's implementation of such general rules. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). A proper

AEDPA analysis requires a federal court to ask whether a principled argument can be made in support of the state court's decision:

> "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."

Richter, 131 S. Ct. at 786. The decision of this Court in *John-Charles* was faithful to this requirement of the law. Employing the correct heuristic the Court observed "that a 'fairminded' jurist could agree with the state's conclusion that . . . *Faretta* do[es] not require reappointment of counsel after an initial waiver of the right . . . ." *John-Charles*, 646 F.3d at 1250.

The Memorandum Opinion eschews this correct approach. Having concluded that a specific "rule" existed, the state courts were given no leeway in the application of general principles derived from United States Supreme Court precedent.

The panel should grant rehearing to examine whether a fairminded jurist could have agreed with the determination of the state court. On this question, *John-Charles* points the way and requires that Rodger's judgment be affirmed.

ARGUMENT

This case concerns whether a criminal defendant's request for legal counsel to file a post-verdict motion for a new trial is a "critical stage," and whether denying such a request, because the defendant previously waived his right to trial

counsel, is a violation of clearly established federal law.

Because Rodgers's petition was filed after April 24, 1996, the amendments to 28 U.S.C. § 2254 under the Antiterrorism and Effective Death Penalty Act (AEDPA) apply. Under AEDPA, Rodgers is not eligible for federal habeas relief unless the decision of the California Court of Appeal, the last reasoned decision from the state court system, was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

This Court acknowledges that the Supreme Court has provided specific examples of "critical stages" under the Sixth Amendment, but it has never squarely addressed whether a post-verdict motion for new trial is one of those stages; the specific issue here.

This should have been the end of the matter. But it was not. This Court Ninth Circuit stated that ninth Circuit precedent "may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help us determine what law is 'clearly established.'"

This is erroneous. In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court explained that "clearly established Federal law" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." Therefore, federal habeas relief may be granted only if the California Court of Appeal's decision was contrary to or involved an unreasonable application of the Supreme Court's applicable

holdings. This was reiterated in *Carey v. Musladin*, 549 U.S. at 74.

A decision is "contrary to" United States Supreme Court authority if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but reaches a different result. *Williams*, 529 U.S. at 413-14.

The Ninth Circuit has acknowledged as much. In *Arredondo v. Ortiz*, 365 F.3d 778, 782-84 (9th Cir. 2004), the defendant made the claim that the Fifth Amendment privilege against self-incrimination applied only to testimony that related directly to the matters at issue in his criminal trial, not to "collateral" matters. The court held that his reliance on Ninth Circuit or other circuit authority was misplaced. The defendant had to show that the California Court of Appeal decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court*." 28 U.S.C. § 2254(d)(1). *Arredondo*, 365 F.3d at 782 (emphasis in the original).

The *Arredondo* court ruled that in light of the precedents of the Supreme Court, it could not say that the California Court of Appeal decision was contrary to, or an unreasonable application of, law established by the Supreme Court. While in that case, there was no question that a witness's credibility was properly subject to exploration once he took the stand, the claim made by the defendant that there was impropriety only in disallowing all testimony when the privilege would have extended only to "collateral" matters, the *Arredondo* court noted this was not a distinction that the Supreme Court has made, so the California Court of Appeal's decision was not contrary to clearly established law.

In a case issued on May 4, 2012, *Crosby v. Schwartz*, --- F.3d ---, 2012 WL 1561032, the court was confronted with a claim that the trial court erroneously denied his subsequent request to withdraw from a jury waiver. The court denied the claim, ruling that there was no clearly established Supreme Court law that held that the Constitution guaranteed a right to a jury trial after a valid waiver of that right. *Crosby v. Schwartz*, WL 1561032 at *5.

The *Crosby* court reiterated the rule that Supreme Court precedent established that a defendant has a right to a jury trial, but that right is waivable, as long as the waiver is express and intelligent. *Patton v. United States*, 281 U.S. 276, 312 (1930), *overruled on other grounds by Williams v. Florida*, 399 U.S. 78, 92 (1970). However, *Patton* was silent on whether there is a duty for a court to restore the right to jury trial, once the defendant has validly waived it, upon request of the defendant. The court noted that the defendant failed to point to, nor had the court itself found, any Supreme Court case that dealt squarely with the issue. Thus, there was no "specific legal rule that has been squarely established" on this issue by the Supreme Court. *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 786 (2011). *Crosby v. Schwartz*, WL 1561032 at *5.

The *Crosby* court noted that The Sixth Circuit in *Sinistaj v. Burt*, 66 F.3d 804(6th Cir. 1995) reached the same conclusion. The Sixth Circuit found that there was no authority for the proposition that "when a state court abuses its discretion in denying a defendant's motion to withdraw a previously filed waiver of jury trial, the result is a violation of the United States Constitution." *Burt*, 66 F.3d at 808. Finding that perhaps such a violation could be made out in certain circumstances, the court emphasized that it could "conceive of no situation in

which a federal judicial determination on *habeas* collateral review that a state court, as a matter of general law, abused its discretion in denying the withdrawal motion is therefore a violation of the federal Constitution." *Id.* (emphasis in original). Addressing a similar issue in the context of an attempted withdrawal of a waiver of the right to counsel, we held in *John–Charles*, 646 F.3d 1243, that there was no Supreme Court precedent to establish an absolute right to reinstate counsel after a valid waiver of the right to counsel under *Faretta*, 422 U.S. 806. *Crosby*, 2012 WL 1561032 at *5.

This view of what constitutes clearly established law was also reiterated in *Mendez v. Knowles*, 556 F.3d 757, 767 (9th Cir. 2009). In *Richter*, 131 S. Ct. 770, the court reiterated the rule it had stated in an earlier case that "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles*, 556 F.3d at 786 (*quoting Knowles v. Mirzayance*, 556 U.S. ___, 129 S. Ct. 1411, 1413–14, (2009)).

In *Cullen v. Pinholster*, __ U.S. __,131 S. Ct. 1388 (2011), the Supreme Court held that standards involved in determining if a state-court decision was contrary to or an unreasonable application of Supreme Court precedent was "difficult to meet[.]" *Id.* at 1398 (*quoting Richter*, 131 S. Ct. at 786.

What these cases stand for is that the touchstone for reviewing a state-court decision and whether it was contrary to or an unreasonable application of federal precedent, is limited to the decisions of the United States Supreme Court. Since this Court readily admits that the Supreme Court has not issued an opinion on the issue concerned with

here, this court should have ruled that there was no error.

But this court's decision makes an error in determining what constitutes clearly established federal law. This court stated that circuit court precedent may provide persuasive authority for determining if a state court's decisions was an unreasonable application of Supreme Court precedent. This court cited to *Mendez*, which stated that "Although § 2254(d) mandates that only Supreme Court precedential holdings clearly establish a right, our circuit precedent may provide persuasive authority for purposes of determining whether a state court decision is an unreasonable application of Supreme Court precedent. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003)."

The quote itself is not remarkable. It holds that circuit court cases may shed light on what is reasonable. The other portion of the quote is important. The acknowledgement is that there must first be Supreme Court precedent, and then circuit court cases may be of aid.

Mendez does not hold that where there is no Supreme Court precedent on an issue, which is acknowledged by this Court here on this issue, that circuit authority may take its place and be ruled as "clearly established law." It if were clearly established, it would have had to come from the Supreme Court. But no Supreme Court case has addressed this issue. One looks to court precedent to determine if a state court decision was unreasonable as it pertains to an application of United States Supreme Court precedent. What this Court did here was to hold that its prior case was clearly established precedent for purposes of habeas corpus, even though the United States Supreme Court had never addressed the issue in play here.

The teaching of the cases cited above is that it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by the Supreme Court.

This court's entire opinion hinges on its belief that it can look to Ninth Circuit authority and determine that a critical stage of the proceedings applies here when the Supreme Court itself has not so held. It is clearly erroneous and leads to an erroneous result.

Based on the above, Respondent requests this Court withdraw its published opinion and hold that because there is no Supreme Court precedent on this issue, there was no unreasonable application of clearly established federal law.

Dated: May 31, 2012
Respectfully submitted,

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Kevin Vienna
Supervising Deputy Attorney General

s/-David Delgado-Rucci
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OPPOSITION BRIEF

No. 12-382

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARSHALL, WARDEN, PETITIONER

VS.

OTIS LEE RODGERS, RESPONDENT.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is post-verdict, pre-appeal motion for a new trial, filed under California law, where the judge sits as "13th juror" and may order a new trial, inter alia, if the judge considers the verdict contrary to the law or to the weight of the evidence, a "critical stage," such that a defendant who conducted his trial through verdict pro se, must, under the Sixth Amendment, be permitted to request the appointment of counsel, which may not be arbitrarily denied, simply because the defendant "made his bed and must now lie it"?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the Central District of California were respondent OTIS LEE RODGERS (petitioner below) and petitioner JOHN MARSHALL, WARDEN (respondent below). In the state courts, the parties were respondent (then, the defendant-appellant) and the People of the State of California (then, the plaintiff and plaintiff-appellee).

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No. 12-382

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARSHALL, WARDEN, PETITIONER,

VS.

OTIS LEE RODGERS, RESPONDENT.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, OTIS LEE RODGERS, respectfully prays that the petition for a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case be denied.

OPINIONS BELOW

The opinions of the courts below are reproduced as appendices to the Petition for Writ of Certiorari, to which the Court is respectfully referred. Appendix A to this response sets out the judgment of the district court denying the petition. Appendix B to this response sets out respondent's Notice of Appeal to the judgment of the district Court. Appendix C sets out the order of the California Supreme Court dismissing review of the judgment of the Court of Appeal.

JURISDICTION

The Court of Appeals for the Ninth Circuit filed an opinion reversing the judgment of the district court and granting a conditional writ of habeas corpus on May 17, 2012. (Cert. Pet. App. A.) Petitioner's petition for rehearing/rehearing en banc was denied on June 28, 2012. (Cert. Pet. App. K.) The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY AUTHORITIES INVOLVED

U.S. Const. Amend. VI "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

Assistance of Counsel for his defence."

28 U.S.C. § 2254 (d). "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

Respondent objects to the Warden's Statement of the Case because it is argumentative.

Respondent believes that the facts and procedural history of this case are correctly laid out by the Report and Recommendation filed by the magistrate-judge in this case :

"On June 27, 2003, a Riverside County Superior Court jury found Petitioner Otis Lee Rodgers guilty of assault with a firearm (Cal. Penal Code § 245(a)(2)), possession of a firearm by a felon (Cal. Penal Code § 12021(a)(1)), possession of ammunition by a felon (Cal. Penal Code § 245(a)(2)), and making criminal threats (Cal. Penal Code § 422). (Lodgment 1, Clerk's Transcript ("CT") at 491-94). The jury also found true the sentencing

enhancement allegations that 1) Petitioner personally used a firearm (Cal. Penal Code §§ 12022.5(a)(1), 1192.7(c)(8)) while committing the assault and making the criminal threats, and 2) that Petitioner was on bail pending trial for another felony offense when he committed the crime of being a felon in possession of ammunition (Cal. Penal Code § 12022.1). (CT at 495-97). Petitioner admitted that he had suffered two prior felony convictions, that he had been sentenced to prison on each of them, and that within five years of release from custody committed another felony offense (Cal. Penal Code § 667.5(b)). (CT at 84, 406; Lodgment 2, Reporter's Transcript, RT at 87-88, 244-45). Petitioner was sentenced to 16 years in prison. (CT at 526-28).

. . . .

Petitioner appealed the judgment to the California Court of Appeal. (Lodgment 3). On August 18, 2005, the California Court of Appeal affirmed Petitioner's convictions and sentence. (Lodgment 6). Petitioner filed a petition for review with the California Supreme Court. (Lodgment 7). The petition was dismissed on July 11, 2007. (Lodgment 26). Meanwhile, while the petition for review was pending in the California Supreme Court, Petitioner filed petitions for writs of habeas corpus with the California Court of Appeal and the California Supreme Court challenging the search of his vehicle. (Lodgments 9, 11 (citing, 547 U.S. 103 (2006)). These petitions were denied. (Lodgments 10, 15). Although Petitioner was represented by appellate counsel, Petitioner also filed numerous *pro per* motions, post-conviction pleadings and writ applications in the California Court of Appeal

and the California Supreme Court, including several motions for substitution of appellate counsel. (*See* Lodgments 25, 29, 36, 31, 33, 38; Supp. Lodgments 2, 3, 4, 5). These claims were rejected by the appellate courts. (Lodgments 27, 30, 32, 35, 36, 39; Supp. Lodgment 1, 6). Petitioner filed a Petition for Writ of Habeas Corpus with this Court on July 24, 2008, raising [] 21 claims for relief." (Cert. Pet. App. D at 33-34, 36-37.) (footnotes omitted.)

The district court adopted the report and recommendation of the magistrate-judge and entered judgment denying the petition. (Cert. Pet. App. B.; the judgment of the district court is attached to this Response as Appendix A.)

PRESERVATION OF THE ISSUE

The issue of whether respondent was entitled by the Sixth Amendment to the appointment of counsel to assist him in the preparation of a motion for a new trial was presented to the California Court of Appeal (*see* Appellant's Opening Brief in the California Court of Appeal, appended hereto as Appendix D). The Sixth Amendment claim was presented to the California Supreme Court, which dismissed review on July 11, 2007. (Response, App. C.)

The Sixth Amendment issue was raised and considered in the district court, which denied the claim. (Cert. Pet. App. D at 57-68.)

The same issue was raised and found meritorious in the Ninth Circuit. (Cert. Pet. App. A.)

REASONS FOR DENYING THE WRIT

The question presented by petitioner is inapt. *Faretta v. California*, 422 U.S. 806 (1975) simply holds that the Sixth Amendment forbids forcing a lawyer on an unwilling defendant and that, as a consequence, the defendant, if found competent to do so, may waive the right to counsel and proceed pro se. *Id.* at 836.[1]

Petitioner's real quarrel is with the Ninth Circuit's holding that the post-verdict, pre-appeal stage of a California trial, where the defendant has an opportunity to file a new trial motion, is a "critical stage" of the proceedings, to which the right to counsel attaches and, further, that a defendant who has represented himself at trial has a Sixth Amendment right to ask that counsel be appointed, a request not to be denied absent a showing of bad faith. One must look beyond *Faretta* to determine whether the Ninth Circuit's holding was grounded in this Court's clearly established precedent.

Before turning to that question, however, it should be noted that the Ninth Circuit has hardly "gone rogue" in this case. In *United States v. Levato*, 540 F.3d 200 (3rd Cir. 2008), cert. denied, 129 S. Ct. 2790 (2009) the court stated what is probably the consensus of the Courts of Appeals, including the Ninth Circuit: "To the contrary we find wide agreement that, once waived, the Sixth Amendment right to counsel is no longer absolute. *See e.g.*

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[1] As will be discussed later in this pleading, The only mention that *Faretta* makes of terminating pro se status isthat the right to represent oneself may be terminated by the court for disruptive behavior. *Id.* at 834, n.46. It would seem somewhat anomalous if the court could do what the defendant, who holds the *Farettal* right personally , could not – terminate self-representation under certain circumstances.

United States v. Solina, 733 F.2d 1208, 1211-12 (7th Cir.), *cert. denied*, 469 U.S. 1039, 105 S. Ct. 519, 83 L. Ed. 2d 408 (1984); ***Menefield v. Borg***, 881 F.2d 696, 700 (9th Cir. 1989); *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982); *United States v. Merchant*, 992 F.2d 1091, 1095 (10th Cir. 1993); *United States v. West*, 877 F.2d 281, 286 (4th Cir. 1989)." *Id.* at 207. For this reason, the court held that "we will not find a Sixth Amendment violation in a trial court's denial of a defendant's post-waiver request for counsel unless the district court's good cause determination was clearly erroneous, or the district court made no inquiry into the reason for the defendant's request." *Id.* at 207-208. (Citation and footnote omitted.) However, the court added, "We agree with the Court of Appeals of the Ninth Circuit that a constitutional violation occurs where a trial court's denial of a request for counsel is based purely in a punitive notion. *Menefield v. Borg*, 881 F.2d 696, 700 (9th Cir. 1989) ("A trial court cannot insist that a defendant continue representing himself out of some punitive notion that the defendant, having made his bed, should be compelled to lie in it.")." *Levato*, 540 F.3d at 208 n.5.

California, with some nuances, is in accord with the consensus of the federal courts. As the California Court of Appeal for the First Appellate District explained in *People v. Nguae*, 229 Cal. App. 3d 1115, 280 Cal. Rptr. 757 (Cal. App. 1991), the differences between California law and Ninth Circuit law, as expressed in the then recent case of *Menefield v. Borg*, 881 F.2d 696 (1989) are, as a practical matter, more illusory than real.

"Under California authority, a judge confronted with a defendant's request to

withdraw a *Faretta* waiver during trial should consider, among other factors, '(1) [the] defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." *People v. Ngaue,* 229 Cal.App.3d at 1124-1125, 280 Cal.Rptr. at 762-763 (internal quotation marks omitted.)

The same criteria are applicable at the post-trial, new trial motion stage. As the *Ngaue* court explained, "Application of these principles to the present case suggests counsel should have been appointed unless appellant was seeking representation for an improper purpose such as delay. Since he had already been convicted, granting appellant's request would cause less disruption than that considered acceptable in *Hill, Cruz* and *Elliott* (see *Menefield v. Borg, supra,* 881 F.2d at p. 701); the fact that appellant had made numerous requests for substitution before trial would not necessarily indicate that his request after "the unsettling experience of trial" (*Menefield v. Borg, supra,* 881 F.2d at p. 701) was for an improper motive, and appellant clearly could not effectively represent himself at this stage of the proceeding. [¶] Indeed, as a practical matter, consideration of the factors identified in *Hill, Cruz,* and *Elliott* in the posttrial context yields a result very similar to that reached in *Menefield.* While the California test is discretionary, *Menefield* describes why most of the

factors considered in the California cases would militate in favor of appointment at this stage. On the other hand, even under *Menefield*, the trial court retains discretion to deny a request for posttrial assistance of counsel where the request is made for a bad faith purpose, and factors such as the defendant's history in substitution of attorneys or purpose to delay further proceedings may bear on the determination whether such a bad faith purpose exists. (See 881 F.2d at pp. 700-701.) Rather than imposing upon the prosecution the burden of demonstrating an improper motive for the request for counsel, however, we view the defendant's motive in requesting to withdraw a *Faretta* waiver as one of the factors for the trial court to consider in exercising its discretion; clearly, a finding that the request was made for an improper purpose such as delay would militate against granting the request." *Id.*, 229 Cal.App.3d at 1125, 280 Cal.Rptr. at 763-764.

Indeed, the California Court of Appeal in the present case did not question the premise that respondent could withdraw his *Faretta* waiver. It simply held that respondent had not provided a good reason for such a move. (Cert. Pet. App. E, at 130: "From our review of the record it is clear that if there were legitimate reasons for the change from self-representation to counsel-representation, defendant was abundantly capable of expressing one. He nevertheless failed to do so. Because the court was not given any reason to grant the defendant's motion, we cannot find that the court abused its discretion in declining to do so." (Citation omitted.) (Cert.Pet. App. D at 130.)

Nor, if one looks closely, did the Court of Appeal reject *Menefield*'s holding that there

is a Sixth Amendment right to seek re-appointment of counsel at what *Menefield* considered to be a critical stage of the proceedings, and that request must be honored under proper circumstances. Rather, the Court of Appeal took issue with *Menefield*'s placing the burden of justifying a denial of appointment on the prosecution. (Cert. Pet. App. D at 130.)[2] The Court of Appeal went on to distinguish *Menefield* because in that case "the accused expressed his reasons seeking the appointment of counsel." (Cert. Pet. App. E at 131.) Under these circumstances, it is at least doubtful whether the Court of Appeal's opinion – the last reasoned state court opinion, *see Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), actually addressed respondent's Sixth Amendment claim, despite its head note, "Sixth Amendment Right to Counsel Regarding Motion for New Trial" (Cert. Pet. App. E at 126.) (Cf. *Chadwick v. Janecka*, 312 F.3d 597, 605-06 (3d Cir. 2001) (Alito, J.) (where state court fails to address properly presented constitutional claim, AEDPA deference does not apply).

There is one final observation before turning to this Court's precedents. It is this:

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[2] It is somewhat misleading, if literally true, to say, as petitioner does, that *Ngaue* rejected *Menefield*.. "*Menefield* in effect holds that a defendant should be allowed to withdraw a *Faretta* waiver in circumstances substantially identical to those presented here. Though decisions of the federal courts are entitled to great weight, we hesitate to follow *Menefield* because in a related context our state Supreme Court has allowed trial courts greater discretion than have the federal courts." *Ngaue*, 229 Cal.App.3d at 1124, 280 Cal.Rptr. at 762. In addition, it should be noted that *United States v. Tajeddini*, 945 F.2d 458, 469-470 (1st Cir. 1991), cited by the California Court of Appeal in this case, is not on point. In that case a defendant who waived appeal sought appointed counsel to assist him in presenting new evidence by way of a motion for a new trial. However, the "new trial motion" at issue was one normally brought after the appeals process was completed and was thus a form of collateral attack on the judgment, for which the Sixth Amendment does not require appointment of counsel. The First Circuit saw no reason to apply a different rule simply because the defendant had waived appeal and sought to attack the judgment collaterally by bringing new evidence.

Petitioner has not suggested to this Court that the Ninth Circuit reached the wrong result in holding that a pro se defendant is forever chained to his *Faretta* waiver, which was basically the ruling of the California trial court, although not mentioned in the Court of Appeals opinion: "You are not going to get counsel, Mr. Rodgers. You made this election to represent yourself. Everybody tried to talk you out of it at the time. You insisted you wanted to do it. You are doing it. We aren't going to substitute in an attorney at this time." (2RT 387; appended hereto as Appendix E.) Later, when respondent expressed confusion about aspects of the California Penal Code, the judge became almost taunting: "Mr. Rodgers, if you had a lawyer, he could explain it to you." (2RT 395; App. E (also not mentioned by the California Court of Appeal.) Rather, petitioner insists that, whether the trial judge (and by extension the Court of Appeal) acted arbitrarily or not, there was no Sixth Amendment violation, because the matter was entrusted to the trial judge's discretion. (Petitioner mischaracterizes the Ninth Circuit's holding as "no discretion rule." Rather, the Ninth Circuit held that "trial courts cannot deny a defendant's timely request for representation without a sufficient reason." (Cert. Pet. App. A at 26.))

The framework for deciding the question of whether the Ninth Circuit's opinion is supported by this Court's cases is provided by this Court's opinion in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). "That the standard is stated in general terms does not mean the application was reasonable. AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*,

549 U.S. 70, 81, 127 S. Ct. 649, 656, 166 L. Ed. 2d 482 (2006) (Kennedy, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer v. Andrade, 538 U.S. 63, 76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).* The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. See, *e.g., Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389* (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).* These principles guide a reviewing court that is faced, as we are here, with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling."

The first issue, whether the post-trial, pre-appeal motion for a new trial under California law is a critical stage requiring the assistance of counsel requires "an examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *United States v. Ash*, 413 U.S. 300, 313 (1973). Put another way, "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134. *See also United States v. Wade*, 388 U.S 218, 226-227 (1967) ("It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at

any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (Footnote omitted.))

There can be no serious doubt that, under these standards, the California new trial motion constitutes a critical stage. There are various grounds for a new trial motion under California law, Cal. Pen. Code, § 1181[3] However, the one most relevant to this discusion is

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[3] Section 1181 provides: When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: 1. When the trial has been had in his absence except in cases where the trial may lawfully proceed in his absence; 2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property; 3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented; 4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors; 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury; 6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed; 7. When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed; 8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.

9. When the right to a phonographic report has not been waived, and when it is not possible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law

(continued...)

§ 1181(6): "The court extends no evidentiary deference in ruling on a section 1181(6) motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a "13th juror." If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is contrary to [the] ... evidence. In doing so, the judge acts as a 13th juror who is a "holdout" for acquittal. Thus, the grant of a section 1181(6).motion is the equivalent of a mistrial caused by a hung jury." *Porter v. Superior Court*, 47 Cal.4th 125, 133, 211 P.3d 606, 610 (Cal. 2009). There can be no doubt that the new trial motion is a "critical stage" for purposes of the constitutional right to the appointment of counsel.

The next question – and the principal one raised by this case – is whether a *Faretta* waiver, once uttered, constitutes an extinction of the right to counsel until the trial ends in a judgment of conviction or acquittal . As earlier indicated, *Faretta* itself strongly suggests that the answer is no. A judge can terminate *pro se* representation. *Faretta*, 422 U.S. at 834 n.46. Moreover, even over the defendant's objection, a court can " appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to

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[3](...continued)
or by rule because of the death or disability of a reporter who participated as a stenographic reporter at the trial or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the trial court or a judge, thereof, or the reviewing court shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding.

represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.* A Sixth Amendment rule which would enable a defendant who has executed a *Faretta* waiver to obtain counsel by bad behavior but not by a timely request made in good faith would not seem to make much sense.

As this Court has recently re-iterated: "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an 'obvious truth' the idea that any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. Effective trial counsel preserves claims to be considered on appeal, see, e.g., Fed. Rule Crim. Proc. 52(b), and in federal habeas proceedings, Edwards v. Carpenter, 529 U. S. 446, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000)." *Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2011). Also, as this Court stated in *United States v. Cronic*, 466 U.S. 648, 659 (1984): "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." It is hard to see how this principle can be applied unless the waiver of one constitutional right can be withdrawn to secure another. Indeed, this Court has stated quite clearly that even if a constitutional right is waived, that waiver can be withdrawn. *Stevens v. Marks,* 383 U.S. 234, 243-244 (1966).

Respondent is not claiming that there is an absolute Sixth Amendment right to the

appointment of counsel for a previously pro se litigant. That is not what the Ninth Circuit held and that is not, apparently what respondent is opposing. Any right, even the right to counsel, can be lost. *See Ungar v. Sarafite*, 376 U.S. 575-590 (1964). The Ninth Circuit's holding recognized this when it held that a request for counsel to assist in a California new trial motion can only be denied for sufficient reasons. This holding was well grounded in this Court's precedents: it established federal law, as defined by this Court, that a criminal defendant has a right to counsel at every critical stage of the proceedings and that he can withdraw a previous waiver of constitutional rights in order to request the assistance of counsel. The principles enunciated by this Court, as set forth above, compel this conclusion and bring the Ninth Circuit's holding in this case comfortably within the folds of AEDPA.

CONCLUSION

Petitioner respectfully requests that the Court deny the petition.

Respectfully submitted,

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NOV 23 2012
OFFICE OF THE CLERK

No. 12-382

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARSHALL, WARDEN,

Petitioner,

v.

OTIS LEE RODGERS,

Respondent.

On Petition for Certiorari
to the Court of Appeals for the Ninth Circuit

RESPONDENT OTIS LEE RODGERS'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (RULE 39 – CJA APPOINTMENT)

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RESPONDENT OTIS LEE RODGERS'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (RULE 39 – CJA APPOINTMENT)

Respondent Otis Lee Rodgers, pursuant to Supreme Court Rule 39 § 1, moves for leave to proceed *in forma pauperis*. Mr. Rodgers is incarcerated in the Riverside County Jail, Riverside, California. The undersigned was appointed by the Court of Appeals for the Ninth Circuit to represent Mr. Rodgers pursuant to 18 U.S.C. § 3006A(a)(2)(B).

Respectfully submitted,

John Ward
Attorney for Respondent Otis Lee Rodgers

November , 2012

CERTIFICATE OF SERVICE

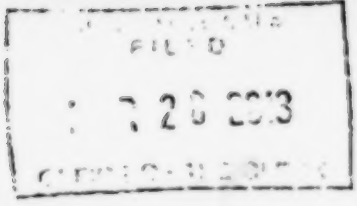
I, John Ward, declare under penalty of perjury that I have mailed a copy of the attached motion to proceed in forma pauperis to David Delgado-Rucci, Deputy Attorney General, 110 West "A" Street, San Diego, California 92101, first-class postage prepaid on November , 2012.

_____
John Ward

SUPPLEMENTAL BRIEF

RECORD
AND
BRIEFS

No. 12-382



In the Supreme Court of the United States

JOHN MARSHALL, WARDEN, *Petitioner,*

v.

OTIS LEE RODGERS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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DONALD E. DENICOLA
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SUPPLEMENTAL BRIEF

This Court has pending before it Warden John Marshall's petition for writ of certiorari,[1] seeking review of the Ninth Circuit judgment (a) holding that the state court had denied respondent Rodgers his right to counsel when it declined to reappoint counsel, previously waived by Rodgers at trial, for the purpose of pursuing a new-trial motion and (b) granting habeas corpus unless the State afforded Rodgers a counseled new-trial motion. Respondent Rodgers now has filed a Declaration of Counsel in Support of Renewed Suggestion of Mootness. In response, petitioner Marshall files this Supplemental Brief pursuant to S. Ct. R. 15.8 (permitting such filing "at any time while a petition for a writ of certiorari is pending, calling attention to . . . intervening matter not available at the time of the party's last filing"). The case is not moot.

Pursuant to the decision of the Ninth Circuit, the district court granted conditional habeas corpus relief, directing that Rodgers either be released or that he be brought before the state court for "the purpose of being appointed counsel for consideration of filing a new trial motion." Rodgers then returned to the state court, where counsel was appointed for him on September 11, 2012. Before newly-appointed

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[1] The Petition for Writ of Certiorari was filed with the Court on September 25, 2012. It has been listed for conference nine times and is currently distributed for conference for March 29, 2013.

counsel had prepared a new trial motion, Rodgers on December 4, 2012, sought to represent himself, and his request was granted. However, no new-trial motion has yet been litigated in the state court, either with or without appointed counsel for Rodgers. So the Ninth Circuit judgment, apparently contemplating that Rodgers would receive a counseled new trial motion, has not yet been satisfied.

Instead, based on the Ninth Circuit decision, the heretofore final judgment of the California courts has been reopened, Rodgers is back in the state trial court actively preparing to file a new trial motion, and is once again seeking to reverse his conviction. If Rodgers were to litigate a new-trial motion without counsel—or even if he were to litigate one with appointed counsel—any failure to obtain a new trial then will likely give rise to a new round of appellate and collateral challenges in the state courts and, perhaps, resumption of federal challenges. In such challenges, respondent predictably could argue that his new waiver of counsel was invalid or that any appointed counsel was ineffective.

Finally, denial of petitioner Marshall's certiorari petition would leave intact the flawed Ninth Circuit decision, *Rodgers v. Marshall*, 678 F.3d 1149 (9th Cir. 2012), which will continue to cause mischief in other federal habeas corpus challenges to state judgments. Contrary to Rodgers's suggestion, the parties continue to have a stake in the outcome of this litigation.

CONCLUSION

The suggestion of mootness should be rejected, and the petition for writ of certiorari should be granted.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
JULIE L. GARLAND
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Counsel of Record
Counsel for Petitioner

March 28, 2013

SUPPLEMENTAL BRIEF

ORIGINAL

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No. 12-382

IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

JOHN MARSHALL, WARDEN,

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v.

OTIS LEE RODGERS,

Respondent.

On Petition for Certiorari
to the Court of Appeals for the Ninth Circuit

SUPPLEMENTAL

RESPONDENT OTIS LEE RODGERS'S DECLARATION OF COUNSEL IN SUPPORT OF RENEWED SUGGESTION OF MOOTNESS

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RESPONDENT OTIS LEE RODGERS'S DECLARATION OF COUNSEL IN SUPPORT OF RENEWED SUGGESTION OF MOOTNESS

John Ward declares under penalty of perjury as follows:

1. I am attorney admitted to practice in this Court and I am Mr. Rodgers's appointed attorney under the Criminal Justice Act.

2. Yesterday, I spoke with the prosecutor representing the state in Riverside County Superior Court in connection with Mr. Rodgers's motion for a new trial. The prosecutor informed me that Mr. Rodgers has fired his appointed counsel and has bee re-instated in pro se status. Mr. Rodgers continues to pursue his motion for a new trial in propria person. The motion has not yet been decided. The state has opposed the new trial motion and moved that Mr. Rodgers be remanded to state prison.

3. In light of these developments, respondent respectfully renews his suggestion that the case is moot and should be dismissed as no live controversy exists between the parties. *See Camreta v. Greene*, 131 S.Ct. 2020, 2028 (2011) ("To ensure a case remains "fit for federal-court adjudication," the parties must have the necessary stake [in the outcome] not only at the outset of litigation, but throughout its course. (Citation.)

_____
John Ward

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_____
John Ward